

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

APRIL 4, 2024

### **O.S.H.A. Stands for...the Organizing Safety And Health Administration? OSHA's New 'Walkaround' Rule Provides Entry Point for Unions**

On May 31, 2024, the Occupational Safety and Health Administration's (OSHA) new "Walkaround" rule will take effect. The amended rule (29 CFR 1903.8(c)) is a sea change for employers, as it was written with the intent of allowing union representatives to participate in OSHA inspections, even in non-union workplaces.

OSHA first attempted to allow non-employee union representatives to participate in OSHA inspections in February 2013. At that time, OSHA issued an interpretation letter that stated 29 CFR 1903.8(c) allowed OSHA to bring union representatives during an inspection. The National Federation of Independent Businesses sued, arguing that interpretation exceeded OSHA's authority. A U.S. District Court agreed and enjoined that interpretation.<sup>1</sup> Before a final determination could be made in that case, the Trump Administration withdrew the interpretation letter in April 2017.

Under the prior rule, non-employee third-party representatives generally were required to have formal credentials to demonstrate a safety or health expertise that would assist the Compliance Safety and Health Officer (CSHO) conducting the inspection. Under the amended rule, however, (1) non-employee representative(s) authorized by employees are not limited to persons with formal credentials such as industrial hygienists or safety engineers; and (2) a third-party representative authorized by employees simply has to be "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace by virtue of their knowledge, skills, or experience" as determined by the CSHO. While the CSHO must determine that there is "good cause" to permit a non-employee third-party to join, OSHA provided no procedure by which the CSHO will make this determination outside of considering the factors listed in the rule (i.e., relevant knowledge, skills or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skill). While employers may inform the CSHO that they do not believe it is appropriate for the third-party representative to join the inspection, OSHA clarified that the CSHO has the ultimate authority to determine whether and which representatives may accompany the CSHO on the walkaround inspection.

#### **Impact on Employers**

Employer advocates fear that the new rule may have significant impacts on employers. For example, it is possible that under this rule, employees could identify a union representative to participate in the inspection, granting union access to a non-unionized workplace. Notably, OSHA

---

<sup>1</sup> *NFIB v. Dougherty*, No. 3:16-CV-2568-D, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017).

FAQs released regarding the new Walkaround rule state that a representative will not be banned from wearing clothing with a union name or logo. Employer advocates have also raised concerns that the new Walkaround rule may make worksites less safe. For example, sites with greater safety risks (e.g., construction sites) may be dangerous for third-party representatives who are not properly trained. This lack of training could also pose a risk to employees at the jobsite.

It is likely that a lawsuit will be filed attempting to enjoin the new Walkaround rule. If the new rule is not enjoined by May 31, 2024, employers may wish to consider the following options if an OSHA investigator shows up with a union representative:

- Employers may refuse to allow the union representative onsite. The CSHO may conduct the inspection without the union representative or may seek a warrant to conduct the inspection with the union representative present. Employers would then need to challenge such a warrant.
- Alternatively, employers could allow the union representative access to the opening conference. At this time, the employer could require the CSHO to demonstrate the “good cause” for having a union representative present. If there is no good cause, one option would be to inform the CSHO that the company is allowing the CSHO access, but that the union representative must leave. The CSHO would then face the same choice as above: move forward without the union representative or seek a warrant.
- Another option would be to inform the CSHO that the company challenges the good cause but will allow the inspection to proceed. And while the union representative may participate in the walkaround, the company would not allow the union representative to participate in any supervisory interviews, or any non-supervisory interviews on-site. (Unfortunately, if OSHA wants to contact a non-supervisory employee outside of the worksite for an interview, and the employee wants the representative present, the employer has no recourse.) With company management accompanying the CSHO and representative during the walkaround, the company would be able to minimize interaction between the representative and employees.

In anticipation of May 31, employers should monitor whether the new Walkaround rule is enjoined, as well as ensure they have procedures in place informing management how to respond if and CSHO wishes to inspect the worksite with a third-party representative.

For more information on the information presented in this information memo, please contact [Michael Billok](#), [Rebecca LaPoint](#), or any attorney in Bond’s [labor and employment practice](#) or the Bond attorney with whom you are regularly in contact.

