Insights: Alerts

OSHA Finalizes Rule Allowing Unions to Participate in OSHA Inspections

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On Monday, April 1, 2024, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") issued its final "walkaround" rule. The final rule broadens worker and union rights to designate an employee or union representative to accompany OSHA inspectors during safety inspections or facility walkarounds, regardless of whether the representative is an employee of the employer. The new rule is scheduled to take effect on May 31, 2024.

How Did We Get To This Final Rule?

In 2013, and in response to a union official's inquiry, an OSHA official concluded in a letter of interpretation that the Occupational Safety and Health Act (the "Act") provided that non-employees of the employer subject to an OSHA inspection could be permitted to accompany OSHA inspectors during the walkaround portion of the inspection. The letter, commonly referred to as the Fairfax Memo, identified examples of individuals who could participate in the walkaround, including union officials of labor organizations that did not represent the employer's employees. In 2017, a federal district court rejected OSHA's interpretation, citing language in the Act explicitly stating that employee representatives "shall be employees of the employer." The Trump administration formally rescinded the Fairfax Memo later that year and removed guidance based on the Fairfax Memo from OSHA's Field Operations Manual.

What Do Employers Need To Know About This Final Rule?

The new rule modifies the Act's language to clarify that employee representatives may be an employee of the employer or a third party, which would include non-employee union representatives. The rule further clarifies that the third-party representatives can be people with "a variety of skills, knowledge, or experience that could aid" the inspection. Under the rule, third-party representatives may accompany OSHA inspectors on a walkaround when "good cause" has been shown why they are "reasonably necessary" to aid the inspection based on their particular skills, knowledge, or experience with hazards in the subject workplace and also similar workplaces. The rule does not require a designated representative to possess any specific qualifications.

Proponents of the new rule have suggested that it addresses workers' fear of retaliation for assisting with inspections and that it will improve the quality of inspections and workplace safety. Conversely, critics of the rule have expressed their belief that it unfairly permits unions to initiate and participate in inspections of workplaces as a means to infiltrate and ultimately organize the workforce.

Like most rules issued recently by the Department of Labor, the final walkaround rule puts employers in a precarious position. Despite allowing OSHA inspectors with authority to determine "good cause" under the new rule, the regulatory text provides no guidance on what the process for determining good cause will entail. Additionally, the rule provides no avenue for employers to object to the selection of a non-employee third-party representative. If the employer refuses to allow the designated third-party, non-employee representative to participate in the walkaround,

the OSHA inspector may obtain a warrant for the third-party to participate. Further, the rule provides for more than one non-employee (or employee) third-party representative to participate in the walkaround if the OSHA inspector determines it will further aid in the inspection. Finally, any refusal by the employer to accommodate a non-employee third-party employee, such as failing to provide personal protective equipment, could be deemed an act of discrimination or interference with the inspection by the employer.

What Should Employers Do Before The Rule Goes Into Effect?

The final rule will almost certainly face legal challenges seeking to enjoin its effectiveness. Nonetheless, given the significant expansion of worker and, frankly, third-party rights during OSHA inspections, employers should take steps to prepare for the rule's application. Specifically, employers should review their existing policies and procedures regarding OSHA inspections and ensure they clearly instruct management and other employees on how to prepare for, receive, and interact with OSHA inspectors and non-employee third-party individuals designated by employees. Employers should ensure their policies and internal communications reflect that non-employee third-party individuals may be allowed to participate in inspections and that interference by employees or management during inspections involving non-employee third-parties could subject the company to OSHA violations or discrimination claims. Our team will continue to monitor any additional updates or material put out by OSHA and update this Legal Alert accordingly.

If you have any questions about the new rule or this alert, please feel free to contact the member of our Labor and Employment team with whom you are regularly in contact.

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