

## **OSHA's Updated Walkaround Rule Takes Effect May 31, 2024**

OSHA's new *Worker Walkaround Designation Process Rule*, which expands employees' right to representation during an OSHA inspection, goes into effect on May 31, 2024. The new Rule permits employees to designate non-employee third parties, such as union organizers, labor activists, and attorneys, to accompany OSHA inspectors during workplace inspections.

### **BACKGROUND**

Under the Occupational Safety and Health Act, OSHA is authorized to conduct unannounced inspections of workplaces known as "walkarounds." Walkarounds may occur following a workplace accident or injury, a complaint to OSHA, or at OSHA's discretion. Both employers and employees have the right to appoint a representative to accompany OSHA inspectors during the walkaround. Previously, the employee representative was required to be an employee of the employer, except in limited circumstances when the presence of a non-employee with special skills, such as an industrial hygienist or safety engineer, was reasonably necessary to conduct an effective and thorough inspection.

### **THE NEW RULE**

The new Walkaround Rule provides that the employee representative may be an employee of the employer **or a third party**. Under the new Rule, third parties will be permitted to accompany an OSHA inspector if, in the judgment of the inspector, good cause has been shown that the third party's presence is reasonably necessary to conduct an effective and thorough inspection. In making a good cause determination, the inspector may inquire about proposed representative's: knowledge, skills, and experience with hazards or conditions in the workplace or similar workplaces; and relevant language or communication skills. This could include questions about the proposed representative's familiarity with the equipment, machinery, work processes, industry, consensus standards or hazards that are present in the workplace, and any specialized safety and health expertise. It could also include language or communication skills that will facilitate the engagement of the employees.

The preamble to the new Rule includes examples of inspections which, according to OSHA, were aided by the involvement of third parties. These include an inspection in which the attorney for a community organization served as the representative for workers of limited English proficiency, and several inspections in which labor unions provided technical input

and information concerning industry practices, assisted OSHA in obtaining access to restricted areas, and identified employees to be interviewed by the inspector.

The new Rule does not establish a single process for employees to designate a representative. Employees can inform OSHA that they have designated a walkaround representative in a variety of ways, including, but not limited to:

- Employees can identify a representative when making an OSHA complaint.
- Employees can authorize a representative to make a complaint on their behalf.
- Employees on an established safety committee can designate a representative.
- Employees can inform the OSHA inspector during the walkaround inspection or during interviews that they have a representative.
- A third party can contact OSHA and indicate that the party represent employees.
- In unionized workplaces, the highest-ranking union official or union employee generally designates the employee representative.

If the inspector determines that a proposed representative's involvement is reasonably necessary, the representative will be permitted to accompany the inspector for purposes of aiding OSHA's inspection of the workplace. The representative may:

- Participate in the opening and closing conferences;
- Accompany the inspector throughout the employee's worksite;
- Provide information to the inspector about: employer operations, policies, and practices; operation of equipment and machinery; industry practices; hazards; etc.;
- Ask questions of the inspector;
- Identify safety concerns and potential violations;
- Provide interpretation during discussions with employees and interview;
- Be present for informal employee interviews conducted during the walkaround;
- If requested by an employee, be present for private employee interviews.

## **IMPACT ON EMPLOYERS**

The new Walkaround Rule impacts the right of employers to control admission to their worksites, and opens the door to access by unions, interest groups, and other third parties with potential interests adverse to the employer. Since taking office in 2021, President Biden has repeatedly affirmed his support for unions, and has directed federal agencies to use their policies, practices, and programs to support union organization and collective bargaining. Consistent with President Biden's directive, the Rule creates a new avenue

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outside of the organizing process, for union representatives and labor activists to gain access to non-unionized worksites. Given the recent increase in organizing efforts by labor unions, employers should anticipate that organizers may use the OSHA inspection process to gain access to worksites and unrepresented employees.

In addition to union access, the new Rule creates several additional challenges for employers seeking to protect company trade secrets, confidential information, and proprietary production processes. Given the broad scope of the Rule, third party representatives may include former employees and other non-employees who work for competitors. In recently issued guidance, OSHA stated that employee representatives will be required to comply with an employer's established rules and policies for visitors, and may be required to sign confidentiality agreements, as long as the employer requires the same of other visitors.

## **PREPARING FOR THE NEW RULE**

While the Walkaround Rule face legal challenges, employers should begin preparing for the Rule's implementation on May 31, 2024. Employers should consider doing the following:

### **1. Prepare an OSHA Response Plan**

Employers have various rights during an OSHA inspection and knowing how and when to exercise these rights can be critical during an inspection. Employers in industries at risk for OSHA involvement (construction, manufacturing, etc.), should have a Response Plan for when OSHA arrives for an unannounced inspection.

### **2. Protect Trade Secrets and Proprietary Information/Processes**

During an OSHA inspection, employers have the ability to restrict access to areas containing trade secrets and confidential/proprietary information and processes. These areas should be identified by company leadership, and proactive steps should be taken to protect them. Individuals who may serve as the employer representative should be trained on how to handle restricted areas during an OSHA inspection.

### **3. Establish (or Review) a Safety Committee**

OSHA recognizes that an employee representative may be designated by a company's safety committee. Employers that do not have a safety committee should consider establishing one, and those with an existing committee should review the responsibilities of the committee. Employers should be mindful of federal and state laws applicable to safety committees and should consult our team.

#### **4. Evaluate Labor Relations Strategy**

Non-unionized employers should evaluate their labor relations strategy and determine whether changes are needed in light of the Walkaround Rule.

Post & Schell's Occupational Safety and Health team counsels and advises clients on workplace safety and health issues, serve as employer representatives during walkaround inspections, and defend employers in OSHA enforcement proceedings. If you have questions about the Walkaround Rule or need assistance preparing for implementation, please contact Angela H. Sanders, 717-391-4436, [asanders@postschell.com](mailto:asanders@postschell.com), or Glenn M. Campbell, 215-587-1030, [gcampbell@postschell.com](mailto:gcampbell@postschell.com).

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