OSHA ALTERS THE BALANCE ON EMPLOYEE REPRESENTATION DURING WALKAROUND INSPECTIONS– OPENING THE DOOR TO UNION ORGANIZING AND LEAVING MANY PRACTICAL QUESTIONS UNANSWERED

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The U.S. Department of Labor's Occupational Safety and Health Administration's (OSHA) regulations have long recognized the rights of both employer and employee representatives to participate in OSHA inspections. In relevant part, 29 C.F.R. § 1903(8)(a) states:

> A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace for the purpose of aiding such inspection. A Compliance Safety and Health Officer may permit additional employer representatives and additional representatives authorized by employees to accompany him where he determines that such additional representatives will further aid the inspection.

For many years, however, subsection 1903.8(c) of the regulation required that representatives authorized by employees be "an employee of the employer." Notwithstanding that plain language, and during the Obama Administration, Deputy Assistant Secretary Richard E. Fairfax, published an OSHA Letter of Interpretation in 2013—the infamous "Fairfax Memo" (sometimes also referred to as the "Sallman Letter")—suggesting that non-employees and third-party union representatives could act as employee representatives during OSHA walkaround inspections. The memo quickly stoked ire among employers, particularly in non-union workplaces, as a backdoor access for union organizers.

In early 2017, and as discussed in a prior **client alert**, a Texas federal district court disagreed with the Obama Administration's interpretation, concluding that the Fairfax Memo "flatly contradicts a prior legislative rule," but the court nonetheless declined to find that issuance of the Fairfax Memo exceeded OSHA's authority under the statute to issue interpretative guidance. Shortly thereafter, as the Trump Administration was settling in, OSHA rescinded the Fairfax Memo.

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However, the issue has remained a political hot potato. It re-emerged during the Biden Administration on OSHA's Unified Agenda in the Fall of 2022, which was followed by an August 2023 proposed rulemaking that revived the essence of the Fairfax Memo. Indeed, the preamble to the proposed rule specifically contemplated broad flexibility in designating representatives, suggesting that such third-party designees could potentially include "[w]orker advocacy organizations, labor organization representatives, consultants, or attorneys who are experienced in interacting with government officials or have relevant cultural competencies." The proposed regulation rekindled objections from employers over the ability of employees to grant access to outsiders into private employer facilities, and the potential for unions to leverage that access to conduct organizing activities.

After notice and comment, a Final Rule issued on April 1, 2024, that rejected these and numerous other employer objections and concerns. As promulgated, the Final Rule amended 29 C.F.R. § 1903.8(c) to eliminate the requirement that the employee representative be an employee. It now specifically permits third parties, which could potentially include union representatives and organizers, to be designated by employees to serve as employee representatives during OSHA walkaround inspections, subject only to a vague, discretionary "good cause" standard.

While the prior version of the regulation did contemplate potential accompaniment by an outside third party such as an industrial hygienist or safety engineer, the new regulation is intentionally and explicitly broader, anticipating that persons with a variety of skill sets could potentially aid the effectiveness of the inspection. The new version of the regulation, which will take effect on May 31, 2024, states:

> The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

This Final Rule also sidestepped numerous practical and logistical concerns raised by commenters, leaving many uncertainties, unanswered questions, and room to argue about implementation. For example, the regulation contains no parameters or procedures for designation of employee representatives, leaving that open to interpretation on a case-by-case basis. The regulation offers no measurable standard for determining how or when the elements of the "good cause" are to be met, or what renders accompaniment by a third party "reasonably necessary." OSHA recently released a **website FAQ** with guidance on the updated regulation, which explains that: "Third-party representatives are 'reasonably necessary' when they will make a positive contribution to a thorough and effective inspection." According to the FAQ, the Compliance Safety and Health Officer will make that abstract and speculative determination after speaking with the employees and the designated representative. The FAQ notes that employers may raise any objections they have with the Compliance Safety and Health Officer, but the Compliance Safety and Health Officer retains ultimate authority to make the determination.

Perhaps even more troubling to employers is the absence of even a simple, straightforward provision saying that the conduct and presence of designated third-parties is limited to participation in the inspection. Instead, the regulation expresses no boundaries, limitations, or accountability to limit the potential for abuse, or to ensure fairness, balance, and consistency to employers while the designee is present on the employer's property.

The Final Rule expressly steers clear of all such issues, stating that "OSHA declines to anticipate and categorize every type of conduct as appropriate or inappropriate or mandate specific rules….OSHA intends to issue further guidance to the extent specific items arise." Such oversight is left to the discretion of the Compliance Safety and Health Officer, who will need to set ground rules during the inspection, but who also lacks the ability to do little more than potentially terminate the participation of a designated representative who is creating unreasonable disruption or interference with the inspection. But, that is hardly consolation to employers who may need to deal with longer-term consequences of rogue behavior or union organizing activities that already occurred, and which were made possible by operation of a regulation that imposes no restrictions or accountability upon designated third-party representatives.

So how should an employer protect itself when faced with a designation issued under the new regulation? Have a plan in advance. The time to object and best address such an issue is when it arises, before the designated representative enters the facility and participates in the walkaround process. Employers should bear in mind that the Compliance Safety and Health Officer either needs a warrant or the employer's consent in most instances to enter private property. Consider obtaining immediate legal advice before proceeding with an inspection. Remember that the language of the regulation is the law, but it is also vague and subject to interpretation. While OSHA guidance materials, interpretations, and FAQ responses are informative of OSHA's position, they are neither equivalent to the regulatory language nor enforceable as such.

Employers should also develop a strategy with counsel on how to respond to a proposed designation based on the prevailing circumstances, the scope of the inspection, and the type and nature of the employer's concerns. Uninvited third-party access may implicate an array of concerns that may need to be addressed, such as questions over the legal enforceability of the regulation itself; the scope and bounds of the designated representative's participation; the potential for union organizing activity or disruptive behavior; the propriety of the designation and "good cause" determination; the competency and utility of the representative as an aid to the inspection; the designated representative's compliance with the employer's safety rules; concerns over collection and recording of information, photos, or video; the protection of proprietary processes and trade secrets; confidentiality concerns or non-disclosure obligations; and others.

Employers should also remember that the Final Rule could face legal challenges over its enforceability, either on its face or as applied.

If you have questions about OSHA's new designation regulation, or other general inquiries about OSHA compliance, please contact **Jason Markel** (716.848.1395), **Glen Doherty** (518.433.2433), or **Charles H. Kaplan** (646.218.7513).

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