OSHA WALKS BACK GUIDANCE ON THIRD PARTIES PARTICIPATING IN AN OSHA INSPECTION AT A NON-UNIONIZED WORKPLACE

OSHA Alert
May 10, 2017

On February 21, 2013, Deputy Assistant Secretary Richard E. Fairfax issued an OSHA Letter of Interpretation suggesting that non-unionized workers without a collective bargaining agreement have a right to designate a particular employee, or even an outside third-party affiliated with a union, to act as an employee representative during the course of an OSHA inspection. The "Fairfax Memo," as it has become known in some circles, quickly drew sharp criticism from employers and business groups as an improper government-sanctioned path to facilitate union organization, a subversion of employers' private property rights, and an unauthorized, back-door rulemaking that intrudes into labor management relations and the collective bargaining process governed by the National Labor Relations Act.

In September 2016, a small business association known as the National Federation of Independent Business (NFIB) filed a lawsuit against OSHA in Texas federal district court challenging the Fairfax Memo. The suit sought declaratory and injunctive relief proclaiming the document and its guidance an unlawful rulemaking undertaken without notice and comment or adherence to the Administrative Procedures Act and that issuance of the Fairfax Memo exceeded OSHA's authority. OSHA moved to dismiss the suit. On February 3, 2017, the district court agreed that OSHA had the authority to issue the Fairfax Memo and dismissed that claim, but declined to dismiss the NFIB's claim that the Fairfax Memo constituted an improper legislative-style rule. The district court concluded that the Fairfax Memo directly contradicted 29 C.F.R. § 1903.8(c), which states that "The representative(s) authorized by employees shall be an employee(s) of the employer."

In the wake of that decision, OSHA walked back and rescinded the Fairfax Memo and related enforcement instructions in its Field Operations Manual via an internal April 25, 2017 Memorandum from Director Thomas Galassi of the Directorate of Enforcement Programs to OSHA Regional Administrators. Although the Galassi Memorandum does not reference the NFIB lawsuit, it does reference 29 C.F.R. § 1903.8(c) and notes that "generally" the regulation calls for the representative to be an employee. The Memorandum goes on, however, to partially quote other portions of the regulation, stating that "where good cause is shown and where 'reasonably necessary to the conduct of an effective and thorough physical

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inspection of the workplace,' a Compliance Safety and Health Officer (CSHO) may allow a third party who is not an employee of the employer to accompany the CSHO during the inspection." The selection and sequencing of these phrases, along with the characterization that the Fairfax Memo is "unnecessary" in light of the regulation, seems designed as an effort to imply that the regulatory language regarding third-party involvement is broader than a fair reading of the regulation as a whole would suggest. Indeed, the only types of third-parties expressly referenced as examples in 29 C.F.R. § 1903.8(c) include an industrial hygienist or safety engineer whose involvement may be "reasonably necessary" to conduct the inspection. When that language is coupled with the "good cause" limitation in the existing regulation, the circumstances justifying an outsider's presence during an OSHA inspection should be quite narrow and circumscribed.

Given the NFIB suit, the Galassi Memorandum may not be the end of the story. And in light of the swearing in just days ago of David Acosta as new Secretary of Labor for the Trump Administration, other OSHA policy changes may be on the horizon. For now, however, the Fairfax Memo is a dead letter.