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## **Workplace Policy Institute—OSHA Changes Course: Will Allow Outside Representatives, Including Union Agents, to Enter Non-Union Worksites During OSHA Inspections**

By Ben Huggett

In a letter of interpretation dated February 21, 2013 (but only publicly released on April 5), the federal Occupational Safety and Health Administration (OSHA) states that, during inspections of non-union workplaces, employees can be represented by anyone selected by the employees, including outside union agents.

The new interpretation from Richard Fairfax, Deputy Assistant Secretary of OSHA, to Steve Sallman, Health and Safety Specialist with the United Steelworkers Union, asserts that OSHA's standard for Representatives of Employers and Employees allows workers at establishments without collective bargaining agreements to designate outside representatives or union agents to represent them during OSHA inspections. This ruling contradicts the plain language of OSHA's governing regulation, 29 C.F.R. § 1903.8(c), as well as longstanding agency guidance and past interpretations.

OSHA's action in allowing unions and other organizations to participate in its inspections, even where they do not formally represent a majority of employees, threatens to disrupt OSHA's primary mission by embroiling the agency in representation organization and community disputes. Moreover, it represents an unwarranted change in existing law that has not undergone appropriate notice and comment rulemaking.

### **Neither the Act nor OSHA's Regulations Support the Interpretation**

Section 8 of the Occupational Safety and Health (OSH) Act provides:

Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.<sup>1</sup>

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<sup>1</sup> 29 U.S.C. § 657(e).

Consistent with this authority, OSHA promulgated a regulation as follows:

The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection.<sup>2</sup>

Following its enactment, this regulation was consistently interpreted by OSHA to provide for accompaniment by a labor union only where such a union was certified or recognized as representing the employees under procedures established by the National Labor Relations Board.<sup>3</sup> Indeed, OSHA's old Field Inspection Reference Manual (FIRM) titled the section on inspection accompaniment "Employees represented by a certified or authorized bargaining agent."<sup>4</sup> OSHA's replacement Field Operations Manual (FOM) includes an identical provision.<sup>5</sup> The following section of the FOM addresses what an OSHA inspector should do where there is "No Certified or Recognized Bargaining Agent":

Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for OSHA inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other **employees** would suitably represent the interests of employees on the walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.<sup>6</sup>

At no point in either manual, or any other guidance, has OSHA ever approved a non-employee union representative for a minority of employees as a participant or observer in an on-site inspection of an employer.

Consistent with its past actions, when OSHA amended its Injury and Illness Recordkeeping Rules in 2002, the agency specifically provided for participation by an "authorized representative." Defining that term, OSHA stated:

**Who is an authorized employee representative?** An authorized employee representative is an authorized collective bargaining agent of employees.<sup>7</sup>

## Comparison to the Mine Safety and Health Administration

Peg Seminario, the AFL-CIO's Safety and Health Director, stated that the interpretation simply confirmed existing OSHA policy and brought OSHA into line with the policies of the Mine Safety and Health Administration (MSHA). In fact, the MSHA and OSHA standards on this issue have until now been quite different, reflecting differences between mining and other industries. Thus, MSHA's regulation contrasts sharply with the OSHA regulation cited above:

Representative of miners means: (1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and (2) Representatives authorized by the miners, miners or their representative, authorized miner representative, and other similar terms as they appear in the Act.<sup>8</sup>

Unlike OSHA, MSHA did not require a representative to be an employee and expressly provided for minority groups of employees to select a representative. Following the Sago mine accident, MSHA's effort to include the United Mine Workers as the representative of two unidentified miners was affirmed by the U.S. Court of Appeals for the Fourth Circuit based upon this clear and unequivocal regulation.<sup>9</sup>

2 29 C.F.R. § 1903.8(c).

3 The Occupational Safety and Health Review Commission, the independent agency which adjudicates OSHA Citations, has defined "Authorized employee representative" to mean "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees." 29 C.F.R. § 2200.1(g). The Review Commission recognizes that "[a]ffected **employees not in collective bargaining unit**" may elect party status. 29 C.F.R. § 2200.22(c) (emphasis added). The Review Commission does not recognize any party status for unions that have not been recognized through the NLRB process for exclusive representation.

4 FIRM § A.3.f.(a) (CPL 2.103).

5 FOM Chapter 3, VII.A.1.

6 FOM Chapter 3, VII.A.2 (emphasis added).

7 29 C.F.R. § 1904.35(b)(2)(i).

8 30 C.F.R. § 40.1(b).

9 *U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275 (4th Cir. 2006).

## Withdrawal of Prior Interpretation Letter Excluding Non-Representative Union

In the new interpretation, OSHA suggested a prior letter of interpretation to a union official with the International Brotherhood of Boilermakers (IBB) might have caused confusion. In that letter the IBB asked whether, at a facility where it did not have a labor agreement, it could act as a walkaround representative during an inspection based upon a complaint filed by the union. OSHA opined that “neither the OSH Act, the regulations in 29 CFR §1903.8, nor the FIRM make any provision for a walkaround representative who has filed a complaint on behalf of an employee of the workplace.”

Withdrawing that interpretation, OSHA stated that the letter stood only for the proposition that the filing of a complaint by a union did not convey inspection walkaround rights. This narrow reading ignored the overall context of the letter and the express acknowledgement that the union was filing the complaint on behalf of the employee—and thus undoubtedly would be the employee’s choice as a representative for any subsequent inspection.

## Conclusion and Recommendations

OSHA’s new interpretation of its existing regulation—allowing non-representative union access to non-union worksites during inspections—fundamentally departs from the regulatory standard without legal authority. While creating a near absolute right of an NLRB certified union to participate in its inspections, the agency has attempted to set itself up as the sole arbiter of other organizations that may participate where there is no recognized union.

In a politically charged organizing environment, non-union employers should ensure that their positive employee relations programs do not neglect safety and health. Establishment of a health and safety committee that includes an expressly defined representative role for participating in an OSHA inspection may not only eliminate interest in a union safety claim, but may also prevent a non-representative union from participating in an OSHA inspection.

When faced with the prospect of OSHA inviting a third party along for an inspection, non-union employers should carefully consider whether to allow OSHA to proceed with the third parties or allow only OSHA to proceed and refuse entry to the third parties. Where the third parties are refused entry, OSHA’s only recourse is to consider that action a refusal to allow OSHA to enter, and request that the Department of Labor Solicitor’s Office initiate an action for an inspection warrant. OSHA would then have to convince a court that the agency has a right to bring the third party representative or union agent onsite during the inspection. Although inspection warrants may be obtained on an *ex parte* basis, where the company has identified that it is represented by legal counsel and stated a legal objection to the inspection conduct, the company may participate in the warrant process or subsequently move to quash the warrant. There are no citations or penalties associated with the exercise of an employer’s rights under the Fourth Amendment, and OSHA is prohibited from retaliating based on the exercise of those rights.

Employers may also be entitled to insist that any outside agent entering a worksite comply with all safety and health obligations and jobsite protections. Any required training, personal protective equipment, and health examinations must be complied with before any outsider should be permitted to enter a worksite for inspection activity. Any protection for confidential information or trade secrets must also be addressed before the inspection. In addition, employers should consider either appropriate insurance coverage or liability waivers before the third parties enter the worksite.

Finally, the new OSHA interpretation may be subject to a broader legal challenge because OSHA failed to conduct notice and comment rulemaking before apparently changing the applicable inspection standard.

[Ben Huggett](#), a Shareholder in Littler Mendelson’s Philadelphia office, exclusively practices management side labor law and OSHA defense. He is thoroughly familiar with these issues having been part of the legal team that successfully excluded the United Steelworkers Union from an OSHA inspection of working conditions for strike replacement workers. Littler Mendelson’s Workplace Policy Institute (WPI) is devoted to developing and influencing workplace legislative and regulatory developments at the federal and state levels. WPI provides the employer community with advocacy services, including litigation support. In addition, WPI closely monitors important labor, employment, and benefits policy initiatives and provides clients, trade associations, and policymakers with timely and thoughtful analysis of the practical implications of such proposals. If you would like further information, please contact your Littler attorney at 1.888.Littler or [info@littler.com](mailto:info@littler.com), or Mr. Huggett at [tbhuggett@littler.com](mailto:tbhuggett@littler.com).