CONN MACIEL CAREY

NCFC NATIONAL COUNCIL OF FARMER COOPERATIVES

Detailed Review of OSHA's New Worker Walkaround Rule

*By **Eric Conn**, **Mark Trapp**, and **Darius Rohani-Shukla***

Like a bad April Fool's joke, to advance the Biden Administration's promise to be "the most labor friendly administration in history," on April 1, 2024, OSHA published in the Federal Register its Final *Worker Walkaround Representative Designation Process* Rule (the "Worker Walkaround Rule"). The new Final Rule amends OSHA's regulation at 29 CFR 1903.8(c) – *Representatives of Employees and Employers* – and will profoundly affect employers' legal risk in future OSHA inspections when it goes into effect on May 31, 2024.

This Alert covers the **controversial history of this rulemaking**, from an Obama Era Interpretation Letter and related legal challenges, through the **flawed rulemaking process** that OSHA followed to promulgate the new rule, to a detailed **review of what the final rule says and means**, along with analysis about the **implications for employers**, expected **legal challenges to the Rule**, and **tips and strategies for managing OSHA inspections** in this new world order.

Background

OSHA's regulation governing participation in OSHA inspection by employee representatives, 29 C.F.R. 1903.8(c), was established in 1993, and it granted employees and their representatives the right to accompany OSHA compliance officers during the physical walkaround phase of workplace inspections. In February 2013, the Obama-Biden Administration sought to give union representatives authority to participate in OSHA inspections at non-union workplaces by way of a formal Letter of Interpretation, commonly referred to as "the Fairfax Memo." The interpretation letter responded to an inquiry by a labor union about inspection rights:

> ***"May workers at a worksite without a collective bargaining agreement designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative?"***

That question was considered within the context of the existing regulatory text of 29 C.F.R. 1903.8(c) at that time:

> *"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 3rd 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."*

Notwithstanding clear regulatory limitations to third party inspection participation rights, including an expectation that any third party participant must have some type of technical credential (e.g., professional safety engineer or certified industrial hygiene), OSHA responded to the union's interpretation request in the affirmative, explaining:

> *"Although the regulation acknowledges that most employee representatives will be employees of the employer being inspected ... **it is OSHA's view that [non-employee] representatives are 'reasonably necessary' when they will make a positive contribution** to a thorough and effective inspection."*

OSHA further emphasized that the OSH Act recognizes the role of employee representatives in enforcement related matters. The employee representative could include any person (including community organization members) who acts in a bona fide representative capacity. OSHA maintained that it could exercise its discretion under 1903.8(c) to allow a non-employee representative, a including a union representative at a non-union workplace, when that person will make a positive contribution to the inspection, including in situations where there is a non-employee representative who is skilled in evaluating similar working conditions or fluent in another language.

It was a leap from the regulation that only allows participation by non-employees who are technical, credentialed experts, like certified industrial hygienists or professional safety engineers, and whose participation is "reasonably necessary to the conduct of an effective and thorough physical inspection," to OSHA's stated position that would allow non-technical expert union representatives whenever OSHA thinks they could "make a positive contribution." Accordingly, Industry representatives filed a legal challenge to the interpretation letter, asserting that it was so inconsistent with 29 C.F.R. 1903.8(c) that it effectively rewrote the regulation without formal notice-and-comment rulemaking. The legal challenge met early success in the court, but it became moot when the reigns at OSHA were

handed over to the Trump Administration, which promptly rescinded the controversial interpretation letter.

As with so many policies and regulations, when the pendulum swung back from the Trump Administration to the Biden Administration, OSHA immediately took steps to roll back the Trump rollback. In this instance, to avoid one of the bases for the prior legal challenge, OSHA set about to make the change using notice-and-comment rulemaking, rather than just issuing a new interpretation letter. The intention of Biden's OSHA with this rulemaking was made clear in the Administration's first Regulatory Agenda:

> *"This rulemaking will clarify the right of workers and certified bargaining units to specify a worker or union representative to accompany an OSHA inspector during the inspection process/facility walkaround, regardless of whether the representative is an employee of the employer, if in the judgment of the Compliance Safety and Health Officer such person is reasonably necessary to an effective and thorough physical inspection."*

OSHA's Quick March from Proposal to Final Rule

Out of the gate, OSHA conveniently appraised this rule as "Not Significant," meaning not having a significant on the economy or otherwise presenting novel or complex issues of law or policy, thereby short-circuiting much of the rulemaking machinations that typically slow down OSHA rulemaking process. As a result, OSHA progressed from a Proposed Rule to a Final Rule in just seven months – a process that often can take seven years.

Under the Administrative Procedure Act (APA), which governs the process by which federal executive agencies promulgate regulations and standards, rules deemed to be Not Significant can follow expedited rulemaking procedures, such as shortening public comment periods (or even waiving of notice-and-comment altogether), skirting SBREFA small business review, and even reducing or eliminating review by the White House's Office of Management and Budget (OMB). Bypassing some of these more onerous rulemaking procedural steps allows agencies to expedite the rulemaking process and finalize rules more quickly.

In this instance, OSHA initially offered a 60-day public notice-and-comment period, and in response to stakeholder concerns, extended that by a slim two weeks. The final rule was sent to the White House's Office of Information and Regulatory Affairs (OIRA) at OMB on February 9, 2024, where it sped through final review, concluding on March 20, 2024.

One reason for OSHA's rush job on this rule was to ensure it was issued before the Congressional Review Act (CRA) review window. Under the CRA, within 60 legislative days of an agency promulgating a new regulation, Congress can vote to oppose the rule, and if the President agrees, the rule will be rescinded. If an agency regulation is rescinded under the CRA, the agency may never again promulgate a substantially similar rule in the future. Of course, President Biden would not sign off on the rescission of a rule promulgated by his own OSHA, but if OSHA regulations are promulgated too close to a Presidential election, and the next Congress and the next Administration are from the other party, "midnight rules" can be wiped out easily. That has happened several times in the past for OSHA rules promulgated by the Clinton and Obama Administration. For example, President Clinton's Ergonomics Standard was rescinded by a Republican-controlled Congress and President George W. Bush, and President Obama's regulation to extend the statute of limitations for injury and illness recordkeeping violations from six-months to five years was rescinded by a Republican Congress and President Trump. By speeding through the Worker Walkaround Rulemaking, and issuing the Final Rule this far ahead of the next election, OSHA has avoided that risk.

Development of the New Rule

The proposed rule OSHA introduced last Fall sought to amend 29 C.F.R. § 1903.8(c) in three ways:

1. Eliminating the extreme bias against third-party employee representative participation in OSHA inspections by proposing to change the regulatory text from "shall be an employee of the employer" to "may be an employee of the employer or a third party."
2. Expanding the types of third parties permitted to participate in OSHA inspections by proposing to change the regulatory text from "such as an industrial hygienist or safety engineer" to "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."
3. Increasing the role that third-party representatives can play during an OSHA inspection from simply "accompanying" OSHA during the physical walkaround phase of the inspection to "participation" in the inspection, which could include attending and even asking questions during private employee interviews, accessing employers' records produced to OSHA pursuant to OSHA's broad subpoena authority, etc.

Conn Maciel Carey formed a rulemaking coalition of individual employers and trade associations to push back on the proposed rule, and we had some measurable success. Our comments put considerable emphasis on the practical concerns of expanding the role of third parties during OSHA inspections, as well as the manifest concerns with the constitutionality of all of these changes, which seems to have paid off. Most notably, the Final Rule differs from the proposal in one crucial way. As a direct result of our advocacy, OSHA abandoned the third proposed change – that is, OSHA dropped the expanded "participation" right of third parties and restored the narrower "accompany" and "accompaniment" language, with a focus just on the physical inspection.

Otherwise, the Final Rule does what OSHA proposed. See below for a comparison of the longstanding regulatory text, the proposed changes, and the final rule:

Original Text of 1903.8(c)

Representatives authorized by employees shall be employees of the employer. However, if in the judgment of the CSHO, good cause has been shown why accompaniment by a 3rd party who is not an employee of the employer (such as an IH or safety engineer) is reasonably necessary to the conduct of an effective and through physical inspection of the workplace, such 3rd party may accompany the CSHO during the inspection."

Proposed Text of 1903.8(c)

Representatives authorized by employees may be an employee of the employer or a 3rd party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the CSHO during the inspection if, in the judgment of the CSHO, good cause has been shown why participation by a 3rd 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).

OSHA's Final Text of 1903.8(c)

Representatives authorized by employees may be an employee of the employer or a 3rd party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the CSHO during the inspection if, in the judgment of the CSHO, good cause has been shown why accompaniment by a 3rd 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).

Immediate Practical Concerns

The net effect of this new rule is that OSHA can hold the door open to a multitude of nefarious third parties over the objections of employers. Although masquerading as an OSHA regulation, the real reason OSHA is promulgating this rule is to make it easier for unions to get access to non-union workplaces, to utilize the OSHA inspection process as a front for organizing campaigns at workplaces where, otherwise, they would not have access. But that is not the most concerning set of interlopers whom OSHA could be foisting on employers. Plaintiffs' attorneys and their "experts" have been trying for decades to get early, unfettered access to workplaces after injuries. Disgruntled former employees are often the instigator of OSHA inspections, and would surely love to come in and wreak havoc with an OSHA compliance officer, disrupting the workplace, perhaps engaging in violent or other criminal conduct (e.g., theft of trade secrets of proprietary information), or just instigating division in the workplace. Family members or injured workers, media, competitors, and community and activist groups could also take advantage of OSHA's new regulation.

This rule becomes effective on May 31, 2024, so employers have less than two months to prepare. We have outlined several practical concerns employers must consider:

- First, union representatives at non-union workplaces might use this rule to improperly solicit and campaign to employees during work hours on company property.
- Second, Plaintiffs' attorneys or their experts will use this regulation to conduct pre-litigation discovery in personal injury or wrongful death actions in a way that is not allowed under the Federal Rules of Civil Procedure.
- Third, worker advocacy groups and community organizations without safety expertise could similarly use it to organize employees in non-union workplaces or find potential litigation for plaintiff's attorneys.
- Fourth, competitors or security threats could gain access to proprietary information and cause significant economic or physical harm.

OSHA's Frequently Asked Question

The day after OSHA issued the Final Worker Walkaround Rule, it also published a Frequently Asked Questions page with guidance about the new rule. The guidance included thirty questions and answers. Here are what we found to be the top five most notable:

1. ***Can a walkaround representative accompany the CSHO in all aspects of the inspection?***

   The walkaround representative is permitted to accompany the CSHO during the walkaround inspection and participate in the opening and closing conferences. The CSHO may conduct informal employee interviews during the walkaround

inspection and conduct private formal interviews separate from the walkaround. Employee and employer representatives are not present for private interviews unless the employee requests the presence of the representative.

2. ***Can an employee walkaround representative ask questions and take photos or measurements during the inspection?***

   Under the OSH Act, the walkaround representative's role in the walkaround is to aid the inspection. To that end, ***the walkaround representative may ask clarifying questions*** *to ensure understanding of the specific item and/or topic of discussion. Because the CSHO takes photographs and measurements, a representative generally does not aid the inspection by taking photos and measurements. However,* ***representatives may take their own photos and measurements if expressly permitted by the employer or another entity that controls the worksite*** *if not the employer, or under the terms of a collective bargaining agreement, provided such conduct does not interfere with the CSHO's inspection.*

   The employee walkaround representative shall be advised that, during the inspection, ***matters unrelated to the inspection shall not be discussed with employees****. See OSHA's FOM, CPL 02-00-164, Chapter 3. An employee representative whose conduct interferes with a fair and orderly inspection, which includes any activity not directly related to conducting an effective and thorough physical inspection of the workplace, may be denied from accompanying in the inspection. See § 1903.8(d) and OSHA's FOM, CPL 02-00-164, Chapter 3. Additional rights and responsibilities of the authorized employee representatives during an OSHA inspection are covered in section 8 of the OSH Act, 29 CFR Part 1903, and OSHA's substance-specific standards. Related rights and responsibilities may be contained in the National Labor Relations Act (and related labor-management statutes), and any applicable collective bargaining agreement.*

3. ***What type of walkaround representative behavior could interfere with the inspection?***

   During the opening conference, the CSHO sets the ground rules for the inspection and makes clear that employee and employer representatives may not disrupt or interfere with a fair and orderly inspection. As explained in OSHA's FOM, CPL 02-00-164, Chapter 3, the employee representative shall be advised that, during the inspection, matters unrelated to the inspection shall not be discussed with employees.

   The CSHO may deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection. See § 1903.8(d). Interfering or disruptive conduct is conduct that delays or impedes the inspection. In addition, any activity not directly related to conducting an effective and thorough physical inspection of the workplace is also deemed to interfere with a fair and orderly inspection. Below is a non-exhaustive list of examples of behavior that may interfere with OSHA's inspection:

   - *Preventing the CSHO from taking essential photographs, video recordings, or surface or air monitoring.*
   - *Preventing the CSHO from interviewing employees in private.*
   - *Resisting or interfering with employee or employer representative involvement in the inspection.*
   - *Failing to stay with the CSHO during the walkaround, such as wandering away from the inspection or going into unauthorized areas.*
   - *Taking unauthorized photographs or videos.*
   - *Solicitation, such as handing out union authorization cards.*
   - *Distributing or handing out any material without the CSHO's review and consent.*
   - *Failing to comply with the ground rules of the inspection.*

4. ***Under certain circumstances, can a 3rd Party asserting representative status be denied access?***

   Yes. *This final rule does not:*

   - *change the CSHO's authority to determine whether a third party has been authorized by employees to be their walkaround representative (29 CFR 1903.8(b)).*
   - *affect other provisions of section 1903 that limit participation in walkaround inspections, su****ch as the CSHO's authority to prevent an individual from participating in the walkaround inspection if their conduct interferes with a fair and orderly inspection*** *(29 CFR 1903.8(d)); or*
   - ***affect the employer's right to limit entry of employee authorized representatives into areas of the workplace that contain trade secrets*** *(29 CFR 1903.9(d)). (emphasis added)*
   - *As always, the conduct of OSHA's inspections must preclude unreasonable disruption of the operations of employer's establishment (29 CFR 1903.7(d)).*

5. ***In a unionized workplace, can employees designate a representative who is not affiliated w/ their union?***

   If employees are represented by a certified or recognized collective bargaining agent, the highest-ranking union official or union employee representative on-site will designate who will participate in the walkaround inspection. *See OSHA's FOM, CPL 02-00-164, Chapter 3. However, if the CSHO determines that an additional walkaround representative would further aid the inspection, the CSHO may permit an additional representative authorized by employees on the walkaround inspection, even if that individual is not affiliated with the union. While this is not a common occurrence, there may be inspections where multiple employee walkaround representatives need to be present, such as multi-employer worksites, if employees designate someone in addition to their union representative. (emphasis added)*

   If the additional walkaround representative is a third party, the CSHO would need to determine if good cause has been shown why accompaniment by the third party ***is reasonably necessary to the conduct of an effective and thorough physical workplace inspection****. The CSHO should consult with the Area or Regional Office on unique requests. In determining whether the additional third-party representative is reasonably necessary and would further aid the inspection, CSHOs will take care to avoid being interjected into labor relations disputes between unions and if they believe any disruption is occurring, they may pause the inspection and reassess accompaniment. (emphasis added).*

Likely Legal Challenges

While there are many potential issues that can be raised to challenge the new Worker Walkaround Rule, the challenges will likely center around several core issues. First, there are good procedural challenges available to the way and manner in which the rule was enacted. These could include challenges under the APA that OSHA has failed to provide a reasoned basis for its change of policy and that it has, therefore, acted arbitrarily and capriciously. In this regard, it is notable that OSHA repeatedly admitted it did not even track the relevant data on how many times employees had supposedly sought and been denied representatives or how many times third-party representatives had accompanied OSHA inspectors. Executive agencies must be able to identify a problem that a new regulation is designed to address. OSHA has presented no evidence throughout this rulemaking that there is an existing problem with employees' accessing effective representation during OSHA inspections. Likewise, as we asserted in our coalition comments, the new rule also violated Executive Order 12866 for substantially similar reasons.

Expected challengers will likely argue that the new rule violates the Regulatory Flexibility Act, as it imposes significant new burdens and costs without complying with OSHA's analysis and disclosure obligations. Under the RFA and the Small Business Regulatory Enforcement Fairness Act, an agency must consider impacts of the rule and any alternatives, but OSHA did not do so in this rulemaking. It instead certified that the new rule imposed no new costs on employers.

Next, it is certain that any legal challenge will include arguments that the new rule conflicts fundamentally with the National Labor Relations Act, inasmuch as it would allow union representatives to be selected without majority consent. It could also conflict with the exclusive representative status of certified labor unions. Given that the new rule appears to allow for multiple representatives, "authorized" by different subsets of employees, or even by individuals, a related challenge may be that the new rule conflicts with the statutory language of the OSH Act.

Other challenges likely to be brought include claims that the Fifth Amendment Takings Clause of the US Constitution forbids the impairment of employer property rights as established in the new rule, and depending on the circumstances, that any inspection violates the Fourth Amendment prohibition of unreasonable searches. It might also be argued that the new rule delegates governmental authority to private individuals in violation of the Constitution.

Tips and Strategies for Employers

Here are our top five tips and strategies for what employers should do to prepare for and manage an OSHA inspection in which OSHA brings along a third-party employee representative (e.g., a union representative at a non-union workplace, a plaintiffs' attorney or expert, a disgruntled former employee, etc.):

1. Designate and **Train an OSHA Inspection Team to manage OSHA inspections**. Ensure every team member knows who to contact and what to do from the moment OSHA arrives on site. Retain experienced OSHA counsel in advance so you are not scrambling when OSHA arrives, and instruct every member of the designated inspection team when and how to contact counsel. The inspection team should be trained on each facet of an OSHA inspection, paying particular attention to the importance and objectives of the opening conference.

To ensure your team is ready for an OSHA inspection, sign-up for Conn Maciel Carey's OSHA Inspections Masterclass. Learn more about this training here.

2. Decide in advance on your **Warrant strategy**. Reasonable minds differ on whether and when to insist on an administrative inspection warrant (or to move to quash or narrow a warrant) versus consenting to an inspection and negotiating the scope and protocols for the inspection. Warrants, in most cases, are rarely the preferred strategic option, but now that OSHA can attempt to include unwelcome third-parties in site inspections, that changes the balance. The key to effectively employing a warrant strategy lies in knowing in advance what your organization will do in various circumstances and being prepared to propose a compromise where consent is given to the CSHO entering the premises, but no third parties.

   One warrant approach in these circumstance would be to consent to OSHA's inspection but refuse consent for the third party's participation. OSHA will most likely treat that as an overall refusal to consent to the inspection, and will seek a warrant. From there, employers can either beat OSHA into federal court seeking a Declaratory Judgment that the third party's participation in the inspection is not warranted or wait until OSHA returns with a warrant, refuse again to allow the third party to enter and move to quash or amend the warrant when OSHA seeks to enforce the warrant in a contempt proceeding. Conn Maciel Carey's OSHA Inspections Masterclass reviews these strategy options in detail.

3. Develop comprehensive **Confidentiality and/or Non-Disclosure Agreements** that apply to all guests (third-party inspection representatives likely can only be bound by confidentiality agreements that required of most visitors), and require the third party to execute the agreement before the site inspection begins. Likewise, designate sensitive **Trade Secret Areas within your workplace**, and seek to exclude the third party inspection representatives from those areas.

4. Establish a **Safety Committee** and ensure that it includes non-supervisory employees. Conduct regular meetings, take notes, and post them so everyone can review them and know what the committee is doing. Having a Safety Committee with management and worker members enables you to suggest that a committee representative is a better option to assist the CSHO with their inspection than an outside union representative or other third party who does not work at the facility. In addition, or alternatively, consider establishing **specialized work groups** (e.g., machine safety, fall protection, chemical safety) that focus on unique or challenging hazards in your workplace. That way, if OSHA shows up to conduct an Amputations National Emphasis Program inspection, for example, who better to assist the CSHO than a member of your Machine Safety Working Group, rather than an unwelcome third party.

5. If you have a multilingual workforce, consider **identifying employees who are willing and able to serve as interpreters in the event of an inspection**, so OSHA cannot suggest a union representative or some other third party for that purpose.

CONN MACIEL CAREY

Eric J. Conn
Chair, OSHA • Workplace Safety Practice Group
202.909.2737
econn@connmaciel.com