



## DOL Publishes Proposed Rule to Allow Third-Party & Union Participation in OSHA Walkthroughs

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*The proposed rule would allow a third party to represent employees, including a union representative at a non-union worksite, in an OSHA walkthrough of the employer's facility.*

The Occupational Safety & Health Administration (“OSHA”) can conduct inspections for several reasons, including as a response to an employee complaint, after the report of a fatality or injury, and in accordance with an emphasis program. The reasonable scope of an inspection will vary based on the trigger for the inspection. Therefore, as a general rule, whenever an OSHA inspector arrives on your premises, it is advisable to contact your legal counsel to protect your rights and guard against an unreasonable, unwarranted search.

### **Current Law & Proposed Change**

During a workplace inspection, a representative of the employer and an authorized representative of the employees must be given an opportunity to accompany the OSHA Compliance Safety and Health Officer (“CSHO”). Currently, the controlling regulation provides the employee representative must be an employee. However, in limited circumstances, the CSHO can be accompanied by a non-employee third party, “such as an industrial hygienist or safety engineer,” if the CSHO determines the third party’s knowledge is necessary to an effective and thorough physical inspection of the workplace.

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The Department of Labor is proposing two broad changes to the regulation. First, the Department plans to remove the mandatory rule that the employee representative must be an employee and, instead, permit employees to designate a third party as their representative. Specific examples of third parties the Department foresees as being authorized representatives of employees include a union representative (such as a local union leader, business agent, or safety specialist), a worker advocacy group, or a community organization representative (such as attorneys on behalf of the group or organization), and a technical representative from a local safety council. Moreover, as part of the comment period, OSHA seeks additional examples of possible third-party representatives.

Second, the Department seeks to further broaden the scope of third-party participation during inspections -- to individuals with knowledge, skills, or experience reasonably necessary in aiding the CSHO -- by eliminating the limiting examples of industrial hygienists and safety engineers. In its explanation of the proposed changes, the Department provided the expansion in scope would include third parties with skills, knowledge, or experience with particular hazards or conditions in similar workplaces, as well as relevant language skills to facilitate more effective communication between the CSHO and employees.

## **What's Next?**

OSHA has opened the public comment period regarding all aspects of the proposed regulation until **October 30, 2023**. Given OSHA's unsuccessful attempts to enforce a similar rule without a notice-and-comment period, it is likely the final rule (whatever form it may take) will be challenged as exceeding OSHA's statutory authority. For example, depending on the breadth of the final rule, litigants may challenge the regulation as "arbitrary and capricious," arguing, in part, that OSHA failed to consider pertinent aspects of the problem it purports to resolve. Other challenges may involve OSHA's effort to interfere with employers' Fourth Amendment rights by requiring employers to give premises access to non-governmental individuals or with statutory rights of employees and employers under the National Labor Relations Act by allowing premises access to unions not certified as the chosen representative of a majority of employees.

If and when the proposed rule is finalized, employers should consult legal counsel and weigh their decision on whether to permit a non-employee representative access to the employer's premises during an OSHA walkthrough prior to OSHA obtaining a warrant requiring access.

Also, employers should be aware there is one positive takeaway: the proposed regulation does not alter the employer's right to protect its trade secrets. During an inspection of an area containing trade secrets, the OSHA regulations still permit an employer to mandate the limitation of employee representation to an employee who works in the area or an employee authorized by the employer to enter that area.