

Employees May Soon be Able to Designate Third Parties, Including Union Representatives, as Their Employee Representative During OSHA Inspections

By Michelle De Oliveira on May 28, 2024



On April 1, 2024, the U.S. Occupational Safety and Health Administration (“OSHA”) published a final rule, amending its existing “walkaround” rule, and expanding employees’ rights by allowing employees to designate non-employee third parties as their employee representative during OSHA inspections. The new rule’s effective date is May 31, 2024.

Current Walkaround Rule

Prior to this amendment, OSHA’s walkaround rule provided that employees and employers were each entitled to a representative during an OSHA inspection to aid in such inspections. Employees, however, could only select a representative who was also employed by their employer.

What Changed?

Now, under the new rule, an employee may select a third-party non-employee as their representative of choice. A third-party, non-employee representative may be someone with various skills, knowledge, and experiences which would help facilitate the OSHA inspection, and need not be limited to individuals who have formal credentials.

An OSHA inspector may, under the new rule, determine whether there is “good cause” as to why the employee would have the third-party as a representative during the inspection. The underlying question will be whether the third-party’s presence is “reasonably necessary” for an effective and thorough workplace inspection. The answer to this question turns on whether there is “good cause” to establish that having the third-party present “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).”

May an Employee Representative be Denied Access to the Walkaround?

As employers may be wondering when/if they can deny workplace access to an employee representative, OSHA published helpful Frequently Asked Questions (“FAQs”) on that issue. According to the FAQs, the answer is: yes, under certain circumstances, workplace access may be denied. Indeed, an OSHA inspector has the ultimate authority to: (a) determine whether the employees authorized the third-party to be their walkaround representative, and (b) to prevent an individual from participating in the walkaround inspection if their conduct interferes with the inspection. Moreover, an employer has the right to limit the

PROFESSIONALS

Michelle De Oliveira

PRACTICES

Employment Law

entry of an employee representative into workplace areas that contain trade secrets.

What Happens if There is a Dispute Between the Employer and the Employee Regarding Access?

If there is a dispute between the employer and the employee as to an individual representative, the OSHA inspector has the ultimate authority to resolve the dispute and determine whether the individual will be granted access to the workplace and able to be present during the walkaround.

What Is Next?

Despite the rule not having taken effect yet, it has not been without controversy. Several interest groups, including the U.S. Chamber of Commerce and the National Association of Manufacturers, joined forces and filed a lawsuit in the U.S. District Court for the Western District of Texas, seeking to block the rule from taking effect. As of this article's publication date, the court has not yet issued any orders blocking the rule from going into effect.

Absent court intervention, the rule's effective date is May 31, 2024. To that end, once the rule is effective, employers should be wary of its inevitable implications—mainly, having to allow non-employees access to jobsites, including areas that may be otherwise off limits to non-employees. Moreover, safety concerns may be palpable when allowing someone who is not familiar with jobsite conditions, and who lacks the jobsite training and expertise an OSHA inspector has, to walk through possibly hazardous areas. Active construction jobsites will need to proactively take steps during a walkaround during which a non-employee is the employee representative to ensure that the individual does not get injured. Last, employers will need to consider whether and how to strategically challenge who an employee designates as their third-party representative. These are just a handful of concerns, and employers will need to assess concerns that may arise once employees start designating non-employees as their representatives during OSHA inspections.

This alert is for informational purposes only and may be considered advertising. It does not constitute the rendering of legal, tax, or professional advice or services. You should seek specific, detailed legal advice prior to taking any definitive actions.

Michelle De Oliveira is a shareholder of the firm and a member of the **Employment Law Group**. A significant aspect of Michelle's practice is devoted to providing businesses and human resources professionals with day-to-day employment law counsel and advice on issues such as, wage and hour, hiring practices, employee discipline, employee terminations, leaves of absence, allegations of discrimination or harassment, reasonable accommodation requests, and any other personnel-related issue that may arise. You can reach Michelle at mmd@riw.com or (617) 570-3533.

POSTED IN: **EMPLOYMENT LAW**