



OSHA Rule Allowing Union Walkthroughs of All Worksites Moves Closer to Finalization: Your 7-Step Survival Guide

Insights

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The Occupational Safety and Health Administration (OSHA) is close to finalizing a rule that will allow workers to designate a union representative to accompany an OSHA inspector during a facility walkaround — regardless of whether the representative is your employee or the facility is a union shop. The White House budget office completed its review on March 20, which means the final rule could be published in the Federal Register at any time. While we expect industry groups to challenge the rule, you should consider taking these seven steps now to prepare for it to ultimately take effect.

[Editor's Note: OSHA issued the final rule on March 29, and it is expected to be published in the Federal Register on April 1. The rule is effective on May 31, 60 days after publication. Check back for updates.]

1. Know Your Rights

OSHA's new proposed rule alters the current regulation by removing the explicit regulatory requirement that an employee representative be an employee of the employer being inspected. Instead, the proposed rule now reads that "the representative(s) authorized by employees may be an employee of the employer or a third party." The proposed rule also authorizes a third party who can be used to assist OSHA during an inspection based on their "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills."

Keep in mind that employers have Fourth Amendment and state property rights, and nothing in the proposed new rule changes that. Even under the new rule, OSHA can only inspect worksites with the employer's consent unless the agency has a warrant. Therefore, employers are still entitled to control how OSHA accesses company property and the areas covered during an inspection unless the agency has a warrant. Work with your counsel if you have questions and to understand the ramifications that might result if you push the agency representatives to demand a warrant.

2. Revisit Your Procedures For When OSHA Shows Up to Conduct an Inspection

Review these comprehensive OSHA Inspection FAQs, then put together a plan for when OSHA arrives at your worksite. For example, designate one supervisory employee to be the contact person when OSHA arrives and ensure OSHA's inspector stays within the inspection's scope. A designated

OSHA arrives and ensure OSHA's inspector stays within the inspection's scope. A designated manager or coordinator should stay with each OSHA compliance officer at all times during the inspection, except during interviews with non-supervisory employees who do not request a manager's presence. It is a strategy question whether to use the safety manager in this role. Be sure you are ready to take side by side photos, sampling, and tests when OSHA requests to do so.

3. Know How to Survive an OSHA Inspection

Review our "Focus 4" Threshold Tips for Surviving an OSHA Inspection that every employer should know: (1) don't permit any manager or supervisor interviews by OSHA on the day the agency arrives; (2) don't give federal OSHA any documents other than your OSHA 300 logs, 300A summaries, 301 forms, and relevant safety data sheets (SDS) on the first day of the inspection; (3) take the OSHA inspector straight to and straight from the area of the referral, complaint, or even the pertinent area of an emphasis program inspection; and (4) ensure your employees are refraining from any high hazardous activities occurring while OSHA is present.

4. Protect Your Trade Secrets

Even if your procedures during an OSHA inspection are not fully developed, a top priority is to ensure that site management knows what areas of the worksite contain trade secrets or other confidential commercial information that you would not want a third-party to see or access. For those areas, you should insist that no third party access these areas, and OSHA's photos should be marked "trade secret."

5. Establish or Recommit to a Safety Committee

If your worksite does not have a safety committee already in place, consider establishing one ASAP. That committee arguably would hold the "representative" role in walkaround inspections, and employees may designate a safety committee member as their representative instead of a union member. Note that when setting up safety committees, you must be aware of the National Labor Relations Act and unfair labor practice concerns if the safety committee is not properly implemented. So, you'll want to seek legal counsel before implementation.

6. Decide if the penalties for refusal warrant a denial of a Third-Party Representatives Access to your worksite

After you have followed the steps above, you may decide as a matter of policy to refuse requests for third parties to accompany OSHA. One option is to advise the OSHA compliance officer that they may conduct their inspection, but you are choosing to deny entry to any third party. You have the Fourth Amendment right to refuse a walkaround inspection on any basis and require OSHA to get a warrant to conduct its inspection. But you should note that OSHA may treat this refusal to allow a third-party on-site as a "refusal of entry" and seek a warrant. Seek legal counsel to decide if refusing entry is the right option for you.

7. Prepare for an Increase in Labor Actions and Union Organizing

See our [prior Insight](#) for a thorough discussion of what is happening across the country on the labor front and things you can do to immediately and efficiently respond to union organizing and work stoppages. For the most up to date information, make sure you [review our Labor Relations Insights](#), since there has been much activity from the NLRB in the recent days and weeks. On the front end, your action plan may include maintaining effective lines of communication with employees, consistently applying work-related policies and procedures, having an effective complaint resolution process in place, and proactively reviewing compensation packages to ensure you remain competitive.

Conclusion

You should understand your rights if OSHA arrives at your worksite and have a plan before you are asked to allow a non-employee to accompany an inspector at your worksite. If you have any questions, contact the authors of this Insight, your Fisher Phillips attorney, or any member of our [Workplace Safety Practice Group](#) or [Labor Relations Practice Group](#). Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information on OSHA issues.

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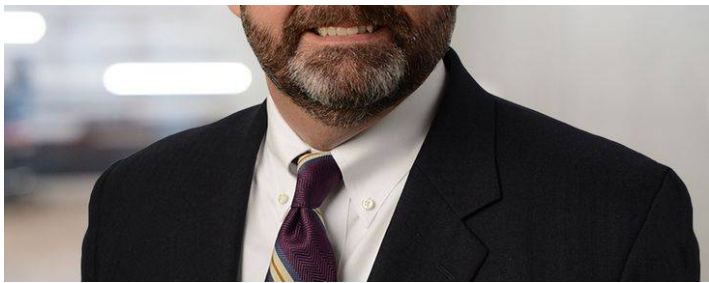
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