



Frequently Asked Questions for Employers About OSHA's New Final Rule on "Walkaround" Inspections

Insights

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The federal government recently issued a final rule permitting third parties – including union representatives – to accompany inspectors during facility walkarounds, raising many questions and concerns for employers from both a safety and a labor perspective. Our Workplace Safety and Labor Relations Practice Groups teamed up to develop this series of FAQs to address all aspects of the new final rule and will update it as new developments occur.

Big Picture

What happened?

The Occupational Safety and Health Administration (OSHA) issued a new final rule on March 29 and published it in the Federal Register on April 1. The final rule amends OSHA's existing "walkaround" rule after a long history led to this rulemaking.

What is OSHA's walkaround rule?

The walkaround rule gives employers and employees the right to authorize a representative to accompany OSHA inspectors during workplace inspections. The walkaround rule has been in place for decades under federal law (29 U.S.C. § 657(e)) and federal regulations (29 C.F.R. § 1903.8).

How does the new final rule change the walkaround rule?

The new final rule expands employees' rights to the presence of a third-party representative.

When does the new final rule take effect?

The new final rule is scheduled to take effect on May 31, 2024.

What Does It Mean?

Does this new rule impact matters beyond site safety?

Yes. This rule change is not an effort to improve the OSHA inspection process. It is designed to provide labor unions an advantage in their organizing efforts. The new rule grants union

representatives access to the property of non-union employers and allows direct interaction with non-union employees. This means employers need to know how to address both the safety and labor relations issues that will come up when this new rule is used.

What specific changes does the new final rule make?

The new final rule removes the general requirement that all employee representatives be employees of the employer. Instead, employee representatives may be employees of the employer **or third parties**.

- Before the new rule takes effect, third-party employee representatives “such as an industrial hygienist or a safety engineer” may accompany an OSHA inspector during the inspection if the inspector determines “good cause” shows why the third party’s accompaniment is “reasonably necessary” for an effective and thorough workplace inspection.
- Once the new rule takes effect, the reference to industrial hygienists and safety engineers is removed and the inspector’s “reasonably necessary” determination may be based on the third party’s “relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills.”

How do these changes impact employers?

The new final rule allows workers to designate a nonemployee representative – based on a broader set of qualifications extending beyond health or safety skills – to accompany an OSHA inspector during a facility walkaround. This could allow union representatives to join OSHA compliance officers as they inspect your worksite, regardless of whether the union rep is your employee or whether your facility is a union shop.

How does the new final rule impact OSHA-approved State Plans?

OSHA “State Plan” states (click [here](#) and check out the final section for more information) will be required to adopt regulations that are identical to or “at least as effective” as OSHA’s new final rule, unless they demonstrate that their existing requirements are at least as effective in protecting workers (in which case, no amendments will be required).

Has OSHA issued any guidance about the new final rule?

Yes. OSHA released its own series of [frequently asked questions](#) (OSHA FAQs) – but keep in mind that these FAQs do not necessarily reflect employer best practices. It’s not clear if additional OSHA guidance is forthcoming.

Practical Details

Can third-party employee representatives participate in all aspects of the inspection?

No. A third-party representative's role is generally limited to:

- accompanying the OSHA inspector during the walkaround portion (and asking clarifying questions if needed); and
- attending the opening and closing conferences.

A third-party representative also may attend private employee interviews conducted by the OSHA inspector if the employee requests their presence.

Are employees required to follow a certain process when designating a representative?

No. There is no single process employees must follow when designating a walkaround representative.

How many employees are required to authorize a third-party representative?

Here's how the [OSHA FAQs](#) address this question: "No set number of employees are required to authorize an employee walkaround representative. It is not necessary for all, or even a majority, of employees to authorize the walkaround representative. However, in a workplace with more than one employee, more than one employee would be needed to authorize the walkaround representative."

Can OSHA designate a third-party employee representative on its own?

No. Third-party employee representatives cannot be authorized without a request or designation by employees.

Can OSHA provide advance notice of an inspection?

Generally, no. OSHA rules prohibit advance notice of inspections, except in cases of apparent imminent danger, when the inspection must be after regular business hours (if management and worker representatives are not likely to be on-site unless they have advance notice), and when OSHA determines that a more complete inspection would result from advance notice.

It's not clear how an employee third-party representative could be on site and on time for an inspection without receiving advanced notice, raising concerns about OSHA tipping them off.

How will OSHA inspectors determine whether "good cause" shows that a third-party employee representative is "reasonably necessary" to conducting the workplace inspection?

Under the new final rule, this determination will be based on the third party's "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills." OSHA guidance elaborates on this point but is also somewhat vague.

According to the OSHA FAQs, inspectors have discretion to make this determination and to do so they might:

- inquire about the representative's "familiarity with the equipment, machinery, work processes, industry, consensus standards or hazards that are present in the workplace, and any specialized safety and health expertise" as well as their "language or communication skills that will facilitate the engagement of the employees"; and
- speak with employees and their designated representatives to determine whether the representative is reasonably necessary – meaning that they will make a "positive contribution" to a thorough and effective inspection (but in all cases the third party must "aid" the inspection).

What are the labor relations issues employers need to be able to address?

If a union representative shows up at your facility to participate in an OSHA inspection, rest assured this is just one part of an extended organizing plan. The plan is likely to include safety complaints from employees and even refusals to work based on safety concerns. For the most part, these actions are protected. To prevent inadvertent legal issues and operational disruptions, you need to train all levels of management on how to deal with protected, concerted activity. If applicable, it will also be important to make sure your facility managers understand how to lawfully and effectively use on-site security services that they might need if employees refuse to work due to safety issues.

Also, many issues related to workplace safety can be mitigated through the lawful use of a safety committee. In fact, safety committees can provide effective options to counter the outside use of third parties during an OSHA inspection. If your operations do not currently use a safety committee, you should consult labor law counsel to determine if it is an option for your operations.

Employer Rights

Can you challenge an OSHA inspector's decision to approve a third-party employee representative?

The new final rule is silent on this question. You may object to a representative by raising your concerns with the inspector, who will decide how to resolve the dispute. Beyond that, OSHA rules do not provide employers with any clear path of recourse. However, you can refuse requests for third parties to accompany OSHA during a facility walkaround, as further discussed below.

Does the new rule allow OSHA to inspect worksites without your consent?

No, unless the agency has a warrant. Employers' Fourth Amendment and state property rights entitle you to control how OSHA accesses company property and the areas covered during an inspection unless the agency has a warrant. This has not changed under the new rule.

Can you refuse requests for third parties to accompany OSHA?

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Yes. 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. You may decide as a matter of policy to refuse requests for third parties to accompany OSHA. One option is to advise the OSHA inspector that they may conduct their inspection, but you are choosing to deny entry to any third party.

What are the top reasons why you may want to refuse entry to a third-party representative?

- You have Fourth Amendment and state property rights that enable you to control who comes onto their premises.
- You may want to consider refusing entry if OSHA shows up with a third party who was not first selected by employees or if the OSHA inspector is unable to justify why third-party representation is reasonably necessary.
- You may want to consider refusing entry if the third party hasn't been trained regarding hazards at the site.
- You may want to consider refusing entry if doing so could jeopardize the confidentiality of your trade secrets or confidential business information.

Are there any employer penalties for denying access to third-party representatives?

Generally, no. There is no citation for refusing to allow a third party on-site when OSHA does not have a warrant. But OSHA may treat this as a "refusal of entry" and seek a warrant. If you refuse a warrant, especially after a court order, you could be subject to court sanctions. Results could vary among different courts.

Are there any risks to refusing requests for third parties to accompany OSHA?

Yes. Seek legal counsel to decide if refusing entry is the right option for you.

Can an employer require a walkaround representative to sign a confidentiality agreement?

Yes. Employers are within their rights to require employer representatives to sign reasonable confidentiality agreements, provided that such agreements are consistent with those required of other visitors at the worksite.

Employer Action Plan

What information should you obtain before an OSHA inspector begins a walkaround with a third-party representative?

You should ask the OSHA inspector:

- if employees designated the third-party representative;

- what relevant knowledge, skills, experience with hazards or workplace conditions, or language or communications the third party possesses; and
- why the third party is reasonably necessary to conduct an effective and thorough physical inspection of the workplace.

What should you do if you want to deny access to a third-party representative?

As mentioned above, you should seek legal counsel before refusing entry to third-party representatives.

How can you prepare for labor relations issues stemming from the new rule?

Train all levels of management on how to deal with protected, concerted activity related to union representatives joining an OSHA inspection. If applicable, you must also make sure your facilities understand how to lawfully and effectively use on-site security services that they might need if employees refuse to work due to safety issues. In addition, you should consult labor law counsel regarding using a safety committee for your operations.

What else can you do to prepare for the new rule to take effect?

You can follow our [7-Step Survival Guide](#) to prepare for the new rule.

What's Next?

Will the rule be challenged? (Answer updated on May 22)

Yes. In fact, a coalition of business groups — including the U.S. Chamber of Commerce and the National Association of Manufacturers – filed a lawsuit in a Texas federal court on May 21 claiming that OSHA exceeded its authority. “Nothing in the OSH Act ... authorizes a parade of non-employee third parties to trample through an employer’s property, and creating such a right of access raises serious constitutional concerns,” according to the complaint. It’s important to note, however, that the walkaround rule remains on track to take effect on May 31 unless a court decides to halt it.

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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