



FP Snapshot on Manufacturing Industry: A Survival Guide to OSHA's Regulation Allowing Union Walkthroughs of Union and Non-Union Worksites

Insights

6.03.24

Welcome to this edition of the FP Snapshot on Manufacturing Industry, where we take a quick snapshot look at a recent significant workplace law development with an emphasis on how it impacts employers in the manufacturing sector. This edition will discuss the latest on the new third-party Walkaround Rule issued by federal workplace safety officials and some steps that manufacturing employers can take to adjust to our new reality. This rule will have a particular impact on manufacturers, so read on to find out what you need to do as a result.

Snapshot Look at the OSHA's New Union Walkthrough Rule

The Occupational Safety and Health Administration's (OSHA) rule allows workers to designate a union representative to accompany an OSHA inspector during a facility walkaround – regardless of whether the representative is your employee or your facility itself is a union shop. The rule alters the status quo by removing the explicit regulatory requirement that an employee representative be an employee of the employer being inspected.

Instead, the rule now reads that “the representative(s) authorized by employees may be an employee of the employer or 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 or communication skills.”

For a deeper dive into the situation, you can read our full coverage here:

- [OSHA Issues Final Rule Allowing Union Walkthroughs of Union and Non-Union Worksites: Your 7-Step Survival Guide](#)
- [Frequently Asked Questions for Employers About OSHA's New Final Rule on “Walkaround” Inspections](#)

From a big-picture perspective, if a union representative shows up at a non-union manufacturing site to participate in an OSHA inspection, it is very likely that the site is being targeted for a significant organizing activity. The “safety” issue is most likely the union's reason to gain site access and interact with non-union employees.

What's Next?

The rule became effective May 31 even though 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 claiming that OSHA exceeded its authority. They argued: “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.”

As of today, however, the Court has not ordered OSHA to suspend its use of the rule. Therefore, manufacturers must prepare for the Rule until and unless a court decides to halt it.

What Do Manufacturers Need to Know?

While the new OSHA rule affects all employers, manufacturers tend to interface with OSHA and union issues more than others. This means manufacturers will likely be faced with requests to have a non-employee third party enter your facilities and plants to accompany an OSHA inspector in the near future. The following will help you prepare:

- **Remember that employers have rights.** The rule does not affect your Constitutional rights. 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.
- **Ensure you have a plan.** Review [these comprehensive OSHA Inspection FAQs](#), then put together a plan for when OSHA arrives at your worksite. Some key points:
 - Designate one supervisory employee to be the contact person when OSHA arrives and ensure OSHA’s inspector stays within the inspection’s scope. They should stay with the OSHA compliance officer at all times during the inspection, except during interviews with non-supervisory employees who do not request a manager’s presence.
 - Be sure you are ready to take side-by-side photos, sampling, and tests when OSHA requests to do so.
 - 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.
- **Ask questions.** If OSHA arrives, and a third-party seeks to accompany OSHA’s inspector, 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.
- **Decide now how to handle third-party walkaround requests.** 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. 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. Consult your employment counsel for the best approach.
 - **Prepare for 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 lawfully but effectively respond to union organizing and work stoppages. For the most up-to-date information, make sure you [review our Labor Relations Insights](#). 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.

Want More?

We will continue monitoring workplace law developments as they apply to employers in the manufacturing industry, so make sure you are subscribed to [Fisher Phillips’ Insight System](#) to have the most up-to-date information sent directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney [on our Manufacturing Industry Team](#).

Related People



Michael D. Carrouth
Partner

Partner
803.255.0000
Email



Lyle M. Chan
Partner
949.798.2168

Email



J. Micah Dickie
Associate
404.260.3419
Email





Nicole Stenoish Myrmo

Associate

858.597.9632

Email

Service Focus

Labor Relations

Workplace Safety and Catastrophe Management

Industry Focus

Manufacturing