

NEW DEPARTMENT OF LABOR RULE ALLOWS EMPLOYEES TO AUTHORIZE NON-EMPLOYEE REPRESENTATIVES ON WALKAROUNDS

For decades, an OSHA regulation has allowed a representative authorized by the employer and a representative authorized by its employees to accompany the OSHA Compliance Safety and Health Inspector (CSHO) during the “walkaround” portion of a workplace inspection. Effective May 31, 2024, under a new rule, employees will be permitted to authorize as their representative a non-employee third party who is “reasonably necessary” to conduct an effective and thorough inspection of the workplace. In union facilities, OSHA’s position has been, and under the new rule will continue to be, that the highest-ranking union official or union employee representative on-site designates who will participate in the walkaround. Therefore, this rule may have the biggest impact in non-union facilities. This rule change will not affect the employer’s right to designate its representative.

When Is a Representative “Reasonably Necessary”? In the past, the CSHO was permitted to allow third parties such as industrial hygienists or safety engineers to attend walkarounds in order to ensure an effective inspection. However, the new rule is broader and allows employees to authorize anyone with the knowledge, skills and experience to be considered reasonably necessary. Although this may include third parties with technical safety skills, it may also include non-technical parties, such as individuals who provide language interpretation to employees, allowing for improved information gathering during an inspection.

Who Decides If a Third-Party Is Reasonably Necessary? It will be the role of the CSHO to determine if the representative authorized by the employees is reasonably necessary. The rule does not specify when or how this is to happen, but we expect it will happen most often during the opening conference phase of the inspection. An FAQ issued by OSHA after the rule’s publication states that an employee who files a complaint with OSHA may designate a representative at the time of filing the complaint. The CSHO will determine if, based on the representative’s skills, experience or knowledge, that individual

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would qualify. A representative is considered “reasonably necessary” when they make a positive contribution to the inspection. The CSHO will be required to inquire about the proposed representative’s qualifications prior to determining if they are reasonably necessary. The rule is silent as to the number of employees needed in order to authorize the employee representative. OSHA’s FAQ states that it will not require a majority of employees to authorize the representative, and that if there is more than one employee onsite, more than one employee would be needed to authorize the representative.

Limits to a Representative’s Presence: Although the employees’ chosen representative is permitted to participate in the walkabout and the opening and closing conferences, they are not permitted to attend private interviews unless requested by the employee. Further, the representative may ask questions to clarify understanding of certain topics; however, unless permitted by the employer, union or another entity controlling the worksite, the representative may not take their own photos or measurements.

The representative is not permitted to engage in conduct that interferes with or disrupts the inspection. Where a representative engages in conduct that could be considered disruptive or interfering with a fair and orderly inspection, the CSHO may deny the representative the right to participate in the walkaround. Examples of what is considered interference may include: (1) preventing CSHO from taking photographs, videos or performing other monitoring activities; (2) failing to remain with the CSHO during the walkaround; (3) handing out union authorization cards; or (4) taking unauthorized photos or videos, among other actions.

Considerations for Employers: Although the new rule does not place any additional compliance requirements on employers, employers should be aware that third-party representatives will be required to comply with the employer’s lawful policies and rules as long as these rules are applied consistently to all visitors and do not create interference with the employees’ rights to have the representative present. The employer may also require that the representative sign a reasonable confidentiality agreement covering the information learned during the inspection.

Further, employers may require the third-party representative to follow the employer’s rules relating to: (1) personal protective equipment; (2) use of equipment such as cameras and phones; (3) visitor safety briefings and orientations; (4) emergency procedures; and (5) other policies relevant to inspections.

If you have any questions about your company’s practices and the impact of this decision, please reach out to your regular Armstrong Teasdale lawyer or



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