

The US Department of Labor Significantly Expands Employee Rights to Designate Third-Party Representatives During OSHA Workplace Safety Inspections

Labor & Employment Law Update

By Kevin Kleine on April 4, 2024

In August 2023, the US Department of Labor (DOL) announced a proposed rule that became final last week, giving employees the ability to designate essentially any third-party as their “authorized representative” during OSHA workplace safety inspections --- even union reps and community organizers. This rule goes into effect on May 31, 2024.

This new rule will significantly impact employers’ rights under federal law and their ability to, among other things, conduct business, maintain secrecy of sensitive and confidential business practices and proprietary information and control or limit access to their property.

The New DOL Rule

The Occupational Safety and Health Act of 1970 (Act) permits both employers and employees to designate a representative to accompany OSHA inspectors (referred to as Compliance Safety and Health Officers (“CSHO”)) and to be present during OSHA workplace safety inspections. The DOL revised 29 C.F.R. § 1903.8(c) to remove the requirement that the representative authorized by employees must be an employee of the employer. The new rule now says that the representative(s) authorized by employees “may be” an employee of the employer **or a third party**. The DOL also revised Section 1903.8(c) to clarify that representative(s) authorized by employees may have a variety of skills, knowledge, or experience that could aid the CSHO's inspection, including knowledge, skills or experience with particular hazards or conditions in the workplace or similar workplaces, as well as relevant language skills a representative may have to facilitate better communication between workers and the CSHO. Meaning, there's no limit to who can be a third-party employee

representative.

OSHA inspectors have sole authority under Section 1903.8 to allow a third-party employee representative to accompany them during a workplace safety inspection. Simply put, after May 31, 2024, OSHA inspectors will have the authority to allow basically anyone to join them in an OSHA workplace safety inspection and onto an employer's property to physically inspect their place of business. This should give all employers across America a sinking feeling in their gut.

How Does This Affect My Business???

After May 31, 2024, employees will be able to designate virtually anyone as their authorized representative if they feel that person --- or persons --- will aid the OSHA inspector in their workplace safety inspection based on the representative's knowledge, skill or experience --- including union representatives or community organizers. Thus, the DOL's new rule has the potential to give union reps and community organizers unfettered access to an employer's property and confidential business information, even at non-union businesses where they don't actually represent a bargaining unit. In essence, union reps and community organizers will be able to report bogus safety violations in an effort to gain access to and snoop around an employer's place of business --- particularly ones where they are trying to organize.

In short, employers' rights to restrict access to their property and safeguard their sensitive and confidential business practices and proprietary information from unauthorized access under federal law will be in serious jeopardy after May 31, 2024.

The Bottom Line

Employers are not without rights or recourse. Therefore, it is critical for employers to routinely consult with their employment, labor and OSHA attorneys to understand and protect their rights. Rest assured the DOL's actions and new rule will undoubtedly be challenged in federal court and spark litigation.

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