

Non Union Employers Beware: OSHA Has Just Become A Union Organizer.

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In a little publicized letter of interpretation, dated April 5, 2013, the Occupational Safety and Health Administration (OSHA) announced for the first time that during an OSHA inspection of non-union worksites, employees can be represented by anyone selected by the employees including outside union agents. In so doing, the letter, issued to the Steelworkers Union earlier this year, OSHA Deputy Assistant Secretary Richard Fairfax gave the green light to allowing union officials and community organizers to serve as the "employee representative" and thus accompany OSHA inspectors when doing inspections of *non*-union workplaces. This development provides a welcoming open door to many union organizers in those industries sought after by labor organizations.

OSHA's Previous Policy

Until now, OSHA's policy has been to allow union representatives to be the "employee representative," but only when the inspection involves a unionized workplace. Historically under Section 8(e) of the Occupational Safety and Health Act of 1970 ("the Act"), the union had to be a recognized representative – in other words a union "certified" by the National Labor Relations Board to act as the employee representative in an OSHA inspection.

OSHA's New Pro Union Interpretation

According to OSHA's new interpretation, non-union employees can select a person who is affiliated with a union or a community organization to act as their "personal representative" in filing complaints on the employees' behalf, requesting workplace inspections, participating in informal conferences to discuss citations, and challenging the abatement period in citations being contested by an employer. The interpretation letter goes on to state that "a person affiliated with a union without a collective bargaining agreement or with a community representative can act on behalf of employees as a walkaround representative."

Under this expansive interpretation, not only can union organizers be designated as the "employee representative" but also individuals such as community activists or perhaps even plaintiff lawyers could participate in an OSHA inspection on behalf of some of the employees.

OSHA's new policy will undoubtedly encourage unions to get involved in OSHA inspections and complaints in non-organized facilities as a means of gaining access to the facility, where they normally would not have access. This change in OSHA policy will certainly be a big boost to union organizing efforts.

OSHA's new interpretation goes directly against its own current Field Operations Manual (FOM). The FOM, in pertinent part, states:

VII. Walkaround Inspection.

A. Walkaround Representatives.

Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives, and will generally include those designated by the employer and employee.

1. Employees Represented by a Certified or Recognized Bargaining Agent.

During the opening conference, the highest ranking union official or union employee representative onsite shall designate who will participate in a walkaround.

2. No Certified or Recognized Bargaining Agent.

Where employees are not represented by an authorized representative, there is no established safety committee, or employees have not chosen or agreed to an employee representative for OSHA inspection purposes (regardless of the existence of a safety committee), CSHOs shall determine if other employees would suitably represent the interests of employees on a walkaround. If selection of such an employee is impractical, CSHOs shall conduct interviews with a reasonable number of employees during the walkaround.

OSHA's new interpretation also goes against its own inspection regulation. Section 1903.8 of the OSHA inspection regulations states in part that:

(b) If there is no authorized representative of employees, or if the Compliance Safety and Health Officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(c) The representative(s) authorized by employees shall be an employee(s) of the employer...

Company Responses To OSHA's New Pro Union Interpretation

The new interpretation letter also raises many questions that have not yet been addressed and may lead to legal issues including:

- do the employees get to vote for the employee representative and does the selected individual have to receive a majority of the employee votes at the facility;
- do different groups of employees get to select their own representative;

- who makes the determination that the selected individual(s) is an appropriate employee representative;
- how many employee representatives can be present during an investigation; and
- what is the scope the non-employee representatives have during the inspection? (For example, does the non-employee representative get to be present during managers and supervisor's interviews).

Employers should first be aware that they have the right to refuse a walkaround inspection on any basis and require OSHA to get a warrant. One option for employers is to advise the OSHA compliance officer that it will permit OSHA to conduct its inspection but it is refusing entry of any third party. OSHA may treat this as a "refusal of entry" and seek a warrant. When before a federal district court judge reviewing the request for the warrant, the Judge may note the contradictions in the Act and OSHA regulations and deny the warrant. Alternatively, this time could be used for the Company to clarify how the questions above are being interpreted and answered.

However, remember that you will not be allowed to participate in or argue on their behalf in the "ex parte" warrant application proceedings. If the warrant is issued by the federal district court judge you would have to decide whether to move to quash the warrant or otherwise oppose it if OSHA attempts to enforce the warrant in federal court. While requiring a warrant might not be the most favorable approach for some employers, it may prevent the excess use of walkaround inspections for organizing non-union workforces if the warrant is ultimately quashed.

In addition to the procedural process outlined above, Companies can proactively consider several ways to minimize the risks associated with the third party walkaround inspections.

- Companies should engage in vigorous compliance with federal and state safety standards. This is a must for any employer who is serious about remaining union free. Unions have been successfully using claims of unsafe working conditions as an important organizing tool for well over a century.
- Companies should have an up to date and effective written Injury and Illness Prevention Program, which is mandated for California employers by SB 198, and be sure *all* employees know and understand its contents.
- Audit your compliance with "right to know" regulations and be sure you have up to date Material Safety Data Sheets as required.

- Be sure that you can document all of the required safety training that goes with the use of any dangerous materials or equipment in the workplace and that all such training records are up to date.
- Do your own walk around inspection before the Cal/OSHA or OSHA inspector arrives. Fix any dangerous conditions. There are a number of qualified safety consultants and trainers that are available for this work. Your workers' compensation insurance carrier may offer preventative inspection assistance.
- Worksites that have formal safety committees in place may be less susceptible to the application of this new interpretation in its OSHA walkaround inspection process. Under the FOM, the safety committees can designate the employee representatives for the facility, which would make it more difficult for the OSHA inspector to choose an outside union organization. If your company does not have a safety committee already in place, you may want to consider establishing one. However, careful thought should be given to the formation of the safety committee where several National Labor Relations Act and unfair labor practice pitfalls exist if the safety committee is not properly implemented.
- Companies should also consider what trade secret, confidentiality, and health & safety measures should be in place before allowing any third party to have access to the worksite. If the OSHA inspector does attempt to bring in a third-party as a part of the inspection, you should attempt to ascertain the reasons for that third-party selection, the scope of the third-party's participation, and why the person's presence is "reasonably necessary" in conducting the OSHA inspection.

It is clear that the new interpretation letter directly contradicts the express language of the Act and OSHA's regulation. So why come out with the new interpretation and what purpose does it serve? What it does is open the door for an OSHA inspection to become a union organizing tactic. While unions have shrunk in the private sector - representing 7.3% of the workforce as of 2012 - they are doing everything possible to increase their ranks while they have a friendly and cooperative administration. Companies should begin working now to know their rights during an OSHA inspection and protect against the possibility that the third party selected for a walkaround inspection is a union organizer.