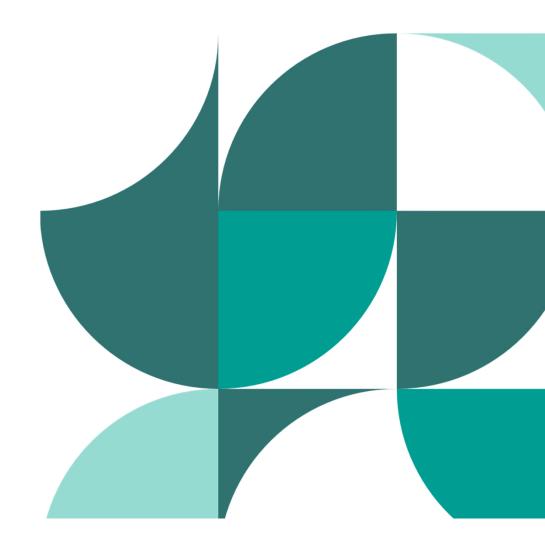


# **Union Intrusion: New OSHA Walkaround Rule**

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#### Seyfarth Shaw LLP

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### **Speakers**



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### **Program Objectives**

- 1. Existing Union Rights During OSHA Inspection
- 2. New Expanded Walkaround Rule
- 3. Effective Date and Court Challenge
- 4. Inspection Management
- 5. Options and Defenses for Addressing Third Party Representative
- 6. Answer Your Questions

## **Existing Union Walkaround Rules**

- Employee Representatives May Accompany OSHA During Inspection
  - "Representative authorized by employees" to accompany "during the physical inspection"
  - CSHO may permit "additional representatives," including for each "phase"
  - Applies to both union and non-union settings
- Employer's right to limit entry of employee authorized representatives into areas of the workplace that contain trade secrets.
- Minimum Burden Doctrine
  - No unreasonable disruption to the operations of establishment
- Some states have different rules (e.g., California)

### **Existing Union Walkaround Rules**

#### Third Parties

- General Rule "Representative(s) authorized by employees <u>shall be an</u> <u>employee(s) of the employer</u>"
- Exception third party who is not an employee is <u>reasonably necessary</u> to the conduct of an effective and thorough physical inspection
- Examples of "industrial hygienist or a safety engineer"

#### • Disputes

- OSHA Compliance Officer has authority to "resolve all disputes" as to who is representative.
- Consult with a "reasonable number of employees"

## Additional Union Rights During OSHA Inspection

- Union Safety Investigation
  - Employee interviews
- Weingarten Rights During Safety Investigations
  - Ask yourself: could this interview lead to potential discipline?
- Union Access to Attorney Notes and Other Attorney-Client Privileged Information?
  - NLRB engages in balancing test
- Provisions of Collective Bargaining Agreement May Expand Rights

### Third Party Walkaround Rule – What's New in the Law

- New General Rule
  - "The representative(s) authorized by employees may be an employee of the employer or a third party"
- Broadening grounds for when CSHO can use judgement to determine third party representative is "reasonably necessary"
  - Eliminates reference to "industrial hygienist or safety engineer"
  - Adds "(including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills)"

### **Effective Date and Court Challenge**

- Rule effective on May 31, 2024
- Chamber of Commerce v. OSHA, No. 24-271 (W.D. Texas)
  - Filed May 21, 2024
  - Requests Injunction
  - Argues that OSHA exceeds statutory authority, violates Fifth Amendment, violates
     APA
  - Cites to ruling striking Obama-era walkaround rule. NFIB v. Dougherty, No. 3:16-CV-2568-D, 2017 WL 1194666 (N.D. Tex. Feb. 3, 2017)
- No ruling yet

## **Basic Inspection Management – Opening Conference**

- When OSHA Arrives:
  - Politely receive the compliance officer
  - Show compliance officer to trailer or private area
  - First impression is important
  - Immediately notify the point person
    - Point person takes control of the inspection is responsible for all communications with Compliance Officer and shadows Compliance Officer throughout inspection
  - Determine basis of inspection
  - Determine rationale for third party representative on site
    - Is this person qualified?
    - Was this person actually selected by employees at the site?

### Legal Defenses and Bases to Push Back

- Advance Notice?
- Third party's suitability, skills, experience
- Method of selection at a non-represented workplace
- Trade secrets and confidential information
- Compliance with lawful worksite rules
  - Confidentiality agreements
- During Walkaround Disruption?





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### What Happens if We Keep Them Out

• CSHO "shall terminate the inspection" or narrow it to areas, topics, and materials to which the employer does not object.

 CSHO must report the employer's refusal – and the reason for it – to their Area Director, who will discuss it with OSHA's attorneys at the Solicitor's Office.

Warrants

### **Inspection Management – Make a Plan**

- Increased enforcement and penalties make inspection management more critical than ever.
- The most effective defenses are developed <u>Before</u> and <u>During</u> an OSHA inspection, not after the inspection
  - Why?
- Inspection Plan Basic Blocking Tackling
  - Point person and backup/weekend person (Murphy's Law is that accidents will happen during the night shift and on weekends).
  - 2) Playbook for how to deal with third party representative

For more information, please contact:

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