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New OSHA rule: 'Safety first' gets a second look

■ JARED SCOT

The Occupational Safety and Health Administration (OSHA), the federal regulatory body tasked with ensuring that workplaces are safe, and that workers who raise alarm over hazardous workplace conditions are free from retaliation for doing so, issued a ruling earlier this year clarifying who may be granted access to job sites during OSHA inspections. The change, known as the Walkaround Rule, has already had a significant effect throughout many industries on Long Island, and some attorneys say that the consequences of the change may be unfair to employers.

"OSHA has generally allowed representatives of both an employer and an employee to accompany the OSHA Inspector during a physical inspection of an employer's job site. Importantly, though, the prior version of the Walkaround Rule explicitly limited an 'employee representative' to current employees only," explains Christopher Hampton, a partner at Meltzer, Lippe, Goldstein & Breitstone LLP in Mineola. "Under the new rule, an employee now has the right to designate unions, labor activists, attorneys and other third parties as their representative."

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In addition to changing the rule to include third parties, Hampton points out that the language of the rule has also been altered to eliminate examples of individuals who might be deemed "reasonably necessary" to accompany inspections, loosening the requirements on who is allowed to enter job sites during walkarounds.

The recent rule change comes after years of contention over OSHA inspection guidelines. In 2013, OSHA issued an interpretation letter that stated 29 CFR 1903.8(c) allowed union representatives to accompany OSHA inspectors during walkarounds, a move that prompted the National Federation of Independent Businesses to sue the administration, arguing that the interpretation exceeded OSHA's authority.

"Before a final determination could be made in that case, the Trump Administration withdrew the interpretation letter in April 2017," says Michael Billok, a partner at Bond, Schoeneck & King PLLC in Melville. "The new rule that took effect in May 2024 is seen as the Biden Administration engaging in rule-making to allow OSHA to bring union representatives to employer sites, regardless of whether the employer's employees are organized."

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A coalition of business associations has filed a lawsuit against OSHA in response to the recent change to the Walkaround Rule, challenging the agency's statutory authority. While plaintiffs contend that Congress never authorized unlimited third-party access to workplaces, lawyers say the case addresses issues concerning employer's rights. "Employers see the rule change as compromising the employers' private property rights by opening the door to a multitude

of nefarious third parties, such as competitors, union representatives, plaintiffs' attorneys and community organizers, by granting access to the employers' property over the objections of the employers," says Frank Brennan, a partner at Forchelli Deegan Terrana LLP in Uniondale.

FRANK BRENNAN: 'As far as guidance goes, we typically advise employers to know the industry that they are in, and the dangers that the industry poses to their employees.'

Brennan also acknowledges the implication that the rule change facilitates unionization. "Employers are keenly aware that the presence of a union representative or community organizers during an OSHA inspection signals that a union-organizing campaign of a non-union employer is likely imminent," he says.

The defendants representing OSHA have argued that the alleged harms caused by the rule change are speculative, invalidating the legal standing of the challenge.

Workers' advocacy groups support the new rule, asserting that it helps workers raise important concerns about hazardous conditions during job site inspections. The National Council for Occupational Safety and Health has said that allowing workers to select their own third-party experts to accompany inspections ensures that information about workplace conditions can be accurately communicated across language barriers, and may also reduce fear of retaliation from employers.

Attorneys understand how the rule change appeals to workers. "It has been argued that non-union employees would stand to benefit most from the ability to designate a non-employee representative... including in situations where there is a non-employee representative who is skilled in evaluating dangers under similar working conditions or is fluent in another language, such as the native language of the employees," Brennan says. "As such, proponents of the rule change take the position that, in spite of OSHA's claimed expertise in safety inspections, it might facilitate more thorough inspections and protection for workers."

Regardless, attorneys representing employers suggest the benefits of the change may be outweighed by the increase in liability. "Such access could lead to labor strife or potential engagement in unreasonable lawsuits," Hampton argues. "Such admission could also provide non-employees (including potential competitors) access to confidential and/or proprietary information. Additionally, employers could subject themselves to potential additional liability and/or expense in the form of exposing third parties to hazards at the worksite during the inspection itself."

For employers that are facing a job site inspection accompanied by an unwelcome third party, attorneys offer advice on how to neutralize problems that may arise, or avoid granting access to the site altogether. "At the opening conference, ask the compliance safety and health officer (CSHO) to demonstrate the 'good cause' for having a union representative present," suggests Billok. "If the company does allow the representative onsite, as for any inspection, company management should accompany the CSHO and representative during the walkaround, which will minimize interaction between the representative and employees."

Many believe the results of the general election could tip the scales for employers. "There is some anticipation that the incoming administration may undertake to modify the new rule by adding language that would limit the use of both uninterested and interested third-party employee representatives that do not possess some demonstrable specific skill that would be needed to complete an inspection," Brennan says. "The next administration could also simply roll it back to the prior rule."

Brennan reiterates the importance of a well-informed legal strategy for employers. "As far as guidance goes, we typically advise employers to know the industry that they are in, and the dangers that the industry poses to their employees."

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