

PUBLICATION

OSHA Clarifies "Walkaround" Rule with Newly Issued FAQ

April 10, 2024

The Occupational Safety and Health Administration's (OSHA) final "Walkaround" Rule was published in the Federal Register on Friday, March 29, 2024. This rule, which goes into effect on May 31, 2024, is an expansion of the Representatives of Employers and Employees regulation (29 CFR 1903.8), which now specifically allows any third-party to be an employee representative and to accompany an inspector during the walkaround inspection of a facility or worksite so long as the inspector determines that the individual is "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (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)." 29 CFR 1903.8 The prior version of the regulation limited the "employee representative" to individuals employed of the employer being inspected, with only a limited exception for certain third-parties with special skills, such as industrial hygienists or safety engineers.

The now final, revision to the "Walkaround" Rule makes it clear that the prior examples of an industrial hygienist or safety engineer are not the only third-party representative options. Rather, the question is left to the discretion of the OSHA inspector's assessment of whether the representative's knowledge, skills, or experience qualifies them for inclusion as a representative. Employers have seen a marked and steady increase in union organizing among their employees. At the same time, unions have worked to devise new ways to get an organizing foothold among employees in a variety of businesses. Employers should be wary of union organizers trying to exploit these changes in order to facilitate their organizing efforts.

Likely in response to public comments, which raised valid concerns, not only to the policy change itself but also related to how this revision to the rule would be practically implemented, OSHA has created a [Frequently Asked Questions page](#) for the "new" rule. These FAQs answer many of the questions that perhaps OSHA should have considered including in the language of the rule itself.

FAQs Answered

Here are some key takeaways from this FAQ page for employers to consider as this new rule goes into effect on May 31, 2024:

- Document the basis that a third-party employee representative is "reasonably necessary." Ask the inspector what "positive contribution" this person will make to his/her inspection. Third-party representatives are "reasonably necessary" only when they "will make a positive contribution to a thorough and effective inspection."
- Remember that employees can request an authorized representative during any portion of the inspection. Inspectors will likely ask employees during the walkaround and/or during the private interviews whether they have an authorized representative.
- Consider developing a Visitor Policy that may include such items as, the signing of a confidentiality agreement, the prohibition from certain areas of the facility, required PPE, any required safety orientations, cell phone usage in the facility, etc. Employers generally have the right to place confidentiality requirements and other limitations on any visitors to their workplace. They can place the same limitations – so long as it will not interfere with the inspection – on a third-party employee representative under this rule.

- Confirm that the inspector has advised or advises any third-party employee representative that matters unrelated to the inspection shall not be discussed with employees during the inspection. See OSHA's FOM, CPL 02-00-164, Chapter 3.
- Ensure that the conduct of OSHA's inspection is not creating an unreasonable disruption of the operations of your workplace. 29 CFR 1903.7(d).
- Verify that the employee representative has been authorized by more than one employee. No set number of employees is required to authorize an employee walkaround representative. However, the plain language of the regulation dictates that in a workplace with more than one employee, more than one employee would be needed to authorize the walkaround representative.
- Watch for activity by the third-party representative that is not in aid of the inspection. Any activity not directly related to the conduct of "an effective and thorough physical inspection of the workplace is also deemed to interfere with a fair and orderly inspection".

OSHA has provided a non-exhaustive list of examples of activities that may be deemed to interfere with OSHA's inspection:

- Preventing the Certified Safety and Health Official (CSHO) from taking essential photographs, video recordings, or surface or air monitoring.
- Preventing the CSHO from interviewing employees in private.
- Resisting or interfering with employee or employer representative involvement in the inspection.
- Failing to stay with the CSHO during the walkaround, such as wandering away from the inspection or going into unauthorized areas.
- Taking unauthorized photographs or videos.
- Solicitation, such as handing out union authorization cards.
- Distributing or handing out any material without the CSHO's review and consent.
- Failing to comply with the ground rules of the inspection.
- Object to the presence of a third-party employee representative when appropriate. Employers and employees can both object to the presence of the other side's authorized representative. The OSHA inspector will evaluate any objections at his/her discretion and consistent with OSHA's FOM, CPL-02-00-164, Chapter 3.
- Ensure the third-party employee representative is only participating in the opening conference, the walkaround inspection, and the closing conference unless an employee requests the presence of the representative in her/her private interview.
- Determine if you want to have your attorney or a safety/health specialist attend the inspection. OSHA will afford both employer and employee representatives, including third-party representatives, a reasonable amount of time to travel to the inspection site, unless an inspection cannot be delayed. In general, the FOM provides that the inspection should not be delayed more than an hour.

What You Need to Know

In general, under 20 CFR 1903.8(a), OSHA limits the employer and the employee representatives to one (1) each. However, the inspector can allow more than one in his/her discretion if they meet the requirements of the rule to be "reasonably necessary" to the inspection.

This rule certainly increases the risk that a union organizer, after speaking to an employee or small group of employees, will put the employee(s) up to filing an OSHA complaint and designating the union organizer as the employee representative for purposes of the inspection. That could grant some level of legitimacy to claims the union might make that the union will improve the workplace. At the same time, a recent [National Labor Relations Board \(NLRB\) decision](#) has made it much easier for a union to organize employees based upon "authorization cards" alone, regardless of the results of an NLRB election. It is absolutely essential that

employers be proactive not only to ensure that their workplace is safe and compliant with OSHA regulations, but that their employees are satisfied and engaged, and that supervisors are fully trained in the "rules of the road" imposed by federal labor law when it comes to union organizing.

For further information regarding the changes to the Representatives of Employers and Employees regulation, its implementation, or general information on how to handle an OSHA inspection, please reach out to [Ashley Meredith Strittmatter](#) or any member of Baker Donelson's [Labor & Employment Group](#).