

# Final Rule on Employee Representation During OSHA Inspections

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## INTRODUCTION:

OSHA issued a press release on March 29, 2024 announcing the publication of a final rule that intends to clarify an employee's right to have a third-party represent them during OSHA inspections. This has stirred-up concern among some employers and associations, especially those who are non-union. We are publishing this article to explain the history of this topic, the changes that will take place, the benefits perceived by OSHA, common concerns, and to provide guidance and a resource for further clarity.

## HISTORY:

After the Occupational Safety and Health Act was signed by President Richard Nixon in 1970, OSHA established and published their original set of rules. One of these rules was 29 CFR 1903.8 which provides the framework for OSHA's inspections, citations, and penalties. The original language of this rule, which is still in effect today, allows employees to designate someone to represent them during OSHA inspections. It goes on to say this representative must be an employee of the employer unless the OSHA Compliance Officer feels a third-party representative (nominated by employees) would help them conduct a more effective and thorough inspection. This was implied to be someone like an Industrial Hygienist or Safety Engineer. To see the specific language of this regulation, see 29 CFR 1903.8(c).

On February 21, 2013, OSHA published a *Letter of Interpretation* in response to a union official's inquiry that said third-party employee representatives during OSHA inspections could be a union official, even if the company was non-union. This obviously caused a lot of concern for non-union companies because they feared it would allow unions the chance to promote unionization and create unnecessary hostility during OSHA inspections.

On April 25, 2017, OSHA rescinded the 2013 *Letter of Interpretation*, which eliminated the concerns non-union companies had. At the time OSHA said the letter was not necessary and emphasized that the regulation still allows employees to designate third-party representatives to represent them and OSHA Compliance Officers can allow it if the third-party adds value.

On March 29, 2024, OSHA issued a press release announcing a change that will be made to the original rule. This change is set to become effective on May 31, 2024 in states that are governed by federal OSHA. States that are governed by state government may delay the effective date.

## CHANGES:

The revised language specifically states that employee representatives may be an employee or third-party. OSHA Compliance Officers no longer need to evaluate the necessity for a third-party and allow it under unique circumstances. Additionally, the third-party does not need to

be an Industrial Hygienist or Safety Engineer. They simply need to have knowledge, skills or experience with the processes and hazards of the worksite or have language skills that facilitate better gathering of information from employees.

#### BENEFITS:

OSHA feels that this change benefits them because it will provide a resource that will help their Compliance Officers better understand detailed operations and hazards, allow them to overcome language barriers, and it may encourage employees to be more comfortable when expressing concern about hazards. They also feel it will help employees because it will ensure inspections are more effective and thorough, resulting in safer workplaces.

#### CONCERNS:

Companies and associations have been expressing various concerns about this new rule since it was published. The most concern has been expressed by non-union groups because they fear this has “resurrected the Fairfax Memo” of 2013 that allowed union officials to participate in non-union inspections. However, that Letter of Interpretation was officially rescinded in 2017 (i.e. it’s no longer recognized by OSHA) and this new rule does not specifically state that union representatives can attend non-union inspections. Could OSHA allow this to happen? Yes. Will they allow this to happen? We don’t know yet. The good news is that new regulatory guidance instructs OSHA Compliance Officers to be sensitive to potential conflicts and deny or suspend a third-party’s involvement if they interfere with a fair and orderly inspection.

Other concerns being expressed include the likelihood of more citations if the third-party has “an axe to grind”, the inability to protect trade secrets, increased liability if the third-party is injured while onsite, and more.

#### GUIDANCE:

Just as employees have the right to nominate someone to represent them during OSHA inspections, so do employers. If your company has a Safety Manager who is capable of effectively representing your company during an inspection, dispatch them to the site. If you don’t, contact someone who is capable (like RMS).

Although the regulation allows a third party to represent employees, it goes on to say that this should only be allowed if the Compliance Officer feels it’s needed for them to conduct an effective and thorough inspection. This may be the case if the Compliance Officer lacks experience and/or knowledge of the type of work performed, they cannot communicate in the language spoken by the workforce, or they otherwise feel incapable. Therefore, if a third party arrives to participate, ask what value they will bring to the inspection. Ask the third party to show or explain their experience and/or ability to help. Challenge the need for the third party or their ability to help if you feel they won’t add the perceived value. The OSHA Compliance Officer is instructed to listen to any objections you have and reverse course if they feel you have valid points.

If you sense a potential conflict of interest with the nominate third party, such as a union official participating in a non-union inspection or a competitor touring your facility, bring those concerns to the Compliance Officer's attention. Try to identify one or more existing employees who can offer the same or better support to the Compliance Officer and suggest utilizing them instead.

If OSHA decides to allow the third-party to continue with the inspection (whoever it may be), treat them just like you would any visitor at your facility. This might include requiring them to wear certain types of PPE, completing a visitor safety orientation, conducting a background check, signing a confidentiality agreement, and/or signing a liability waiver. If they do not have the necessary PPE (that is not provided by your company to visitors), they have not completed the required training, or they refuse to participate in other standard requirements you may deny their entry.

Make sure your representative participates in the entire inspection process and stays with any third-party representatives. Your representative should make sure the third-party representative does not enter any restricted areas, take pictures of anything, solicit confidential information from employees, point-out invalid concerns, widen the scope of the OSHA inspection, or otherwise act in a way that prevents the inspection from being fair and orderly.

#### QUESTIONS:

Many questions are being asked about this regulation. OSHA has done a fairly good job of predicting some questions that would be asked and published a "Frequently Asked Questions" page on their website that includes 30 questions and answers. If you have questions about this, we highly recommend you visit this page. The web address is [www.osha.gov/worker-walkaround/final-rule/faq](http://www.osha.gov/worker-walkaround/final-rule/faq). RMS is also available to help if needed.