



September 18, 2013

The Honorable John Kline
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections

Dear Chairman Kline and Chairman Walberg:

I am writing in response to your letter to Assistant Secretary David Michaels, dated June 13, 2013, regarding the U.S. Department of Labor's (Department or DOL) Occupational Safety and Health Administration (OSHA) letter of interpretation addressing whether Compliance Safety and Health Officers (CSHO) can be accompanied by third-parties who are selected by employees of the company being inspected.

The Department issued the letter of interpretation on February 21, 2013, in response to a query from Mr. Steve Sallman, Health and Safety Specialist with the United Steel, Paper and Forestry Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. Mr. Sallman had asked whether workers at a workplace without a collective bargaining agreement may authorize a person who is affiliated with a union or a community organization to act as their representative under the Occupational Safety and Health Act (OSH Act) for purposes of accompanying OSHA on an inspection of the workplace. A copy of Mr. Sallman's request is enclosed, along with the Department's response to Mr. Sallman, which provides a more in depth discussion of the Department's legal analysis and reasoning.

Specifically, with respect to OSHA inspections, Section 8(e) of the OSH Act provides that "[s]ubject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the purpose of aiding such inspection." 29 U.S.C. § 657(e). These representatives are sometimes referred to as "walk-around representatives." Allowing non-employee third-party representatives designated by workers at the worksite to accompany OSHA inspectors on walk-around inspections is consistent with the language and intent of Section 8(e).

The Department's regulations allow a CSHO to permit third parties to be walk-around representatives in order to make a positive contribution to a thorough and effective inspection. Specifically, 29 C.F.R. §§ 1903.8(a)-(d), allow the CSHO significant discretion as to who participates in inspections. Although § 1903.8(c) states the general rule that walk-around representatives "shall be" employees of the employer, it explicitly allows walk-around participation by a non-employee representative when, in the judgment of the CSHO, such a

representative is “*reasonably necessary to the conduct of an effective and thorough physical inspection.*” While Section 1903.8(c) offers examples of industrial hygienists or a safety engineers as possible third parties, it does not purport to be an exhaustive list and does not preclude other third parties who may make a positive contribution to a thorough and effective inspection.

Allowing non-employee third-party representatives to accompany OSHA inspectors on walk-around inspections is not a new OSHA policy. OSHA has traditionally interpreted the statutory language to mean that, subject to some limitations, it is up to the employees to choose a representative who will accompany the CSO during a workplace inspection.¹ For example, from time to time workers with collective bargaining agreements have selected experts from the national office of their union to act as the walk-around representative. There have also been times when workers without collective bargaining agreements have selected outside individuals or organizations to act as their walk-around representatives during OSHA inspections. Recent examples include a 2011 inspection of a warehouse in Hershey, Pennsylvania where members of the National Guestworkers’ Alliance were designated as walk-around representatives by the employees, and a 2012 asbestos inspection in Washington D.C., where the Public Justice Center served as the walk-around representatives at the request of the workers. Courts have also upheld the rights of striking workers to act as walk-around representatives.²

The March 7, 2003, letter of interpretation (the “Racic letter”) addressed a different, but related question: whether a third party who had filed a complaint was automatically entitled to participate in an inspection arising out of that complaint. The conclusions in the Racic letter were confined to the situation presented there and did not address the question posed more recently by Mr. Salman. Nonetheless, some of the language used in the Racic letter lacked precision, causing confusion within the regulated community and potentially creating the perception that it prohibited “the right of workers at a facility without a collective bargaining agreement to have a representative of their own choosing participate in an inspection.” Because such an interpretation would be “inconsistent with the OSH Act and with OSHA’s regulations,” OSHA withdrew the Racic letter.

Finally, the analysis contained in the Department’s response to Mr. Sallman does not affect existing policies or laws regarding liability, advance notice or the use of interpreters for non-English speaking workers. Specifically, with respect to trade secrets, Section 1903.9(d) allows an

¹ OSHA’s Field Operations Manual at 3-19. Available at https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-150.pdf.

² *In re Establishment Inspection of Caterpillar, Inc.*, 55 F.3d 334, 338 (7th Cir. 1995) (enforcing a warrant allowing a striking employee to participate in an OSHA inspection, holding that “the plain language of § 8(e) permits private parties to accompany OSHA inspectors” as walk-around representatives). More recently, in a unpublished order issued in February 2011, the Federal District Court for the Southern District of Illinois issued an oral order permitting a representative of a locked-out union to participate in an inspection of the Honeywell Metropolis Works facility located in Metropolis, Illinois.

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employer to limit entry to an area containing trade secrets to employee representatives who are authorized by the employer to enter that area. I also want to assure you that OSHA intends to continue to ensure that the focus of all participants in its inspections is on worker safety and health. The walk-around regulations as a whole provide numerous safeguards to allow CSHOs to maintain this focus. For example, Section 1903.8(d) specifically authorizes a CSHO "to deny the right of accompaniment under this section to any person whose conduct interferes with a fair and orderly inspection." Nothing in the Department's response to Mr. Sallman's letter affects these rules.

If you or members of your staff have any questions about this response, please contact Kate Garza in the Department's Office of Congressional and Intergovernmental Affairs. She may be reached at (202) 693-4600.

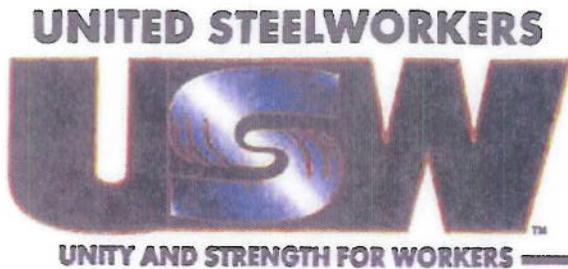
Sincerely,



Brian V. Kennedy
Assistant Secretary
Congressional and Intergovernmental Affairs

Enclosure: Documents Bates stamped DOL E&W OSHA Walk-arounds 001-005.

cc: The Honorable George Miller
Senior Democratic Member
Committee on Education and the Workforce



December 18, 2012

Dr. David Michaels, PhD
Assistant Secretary
Occupational Safety and Health Administration
200 Constitution Ave NW
Washington DC 20210

Dear Assistant Secretary Michaels:

I am writing to ask whether a union representative or representative of a community organization should be able to act on behalf of one or more employees. This would include representing the employee(s) as a personal representative and accompanying the employee on an OSHA inspection at a given workplace where the union does not have a collective bargaining agreement. In that case, would the person representing the employee on whose behalf our union is filing an OSHA Complaint be able to act as a walkaround representative.

Section 8(e) of the Occupational Safety and Health Act states that "a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace...for the purpose of aiding such inspection."

Furthermore, OSHA regulation 1903 states that "the representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection.

We believe that, in many cases, it is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, for a person authorized by employees of a business to accompany an OSHA inspector and act as the worker representative. Such cases may, for example, include situations where:

- The workers' personal representative has experience evaluating similar working conditions in a plant and can point out changes from usual patterns that could affect the outcome of the inspection and improve the accuracy of air sampling.

- The workers' personal representative can provide a foreign language translator who is trusted by the workers at the plant.
- The workers only feel secure talking to or providing information to CSHOs in the presence of the workers' personal representative.

Sincerely,



Steve Sallman
Health and Safety Specialist.



Reply to the attention of:

FEB 21 2013

Mr. Steve Sallman
Health and Safety Specialist
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and
Service Workers International Union
Five Gateway Center
Pittsburgh, PA 15222

Dear Mr. Sallman:

Thank you for your December 18, 2012, letter to the Occupational Safety and Health Administration (OSHA). You ask whether workers at a workplace without a collective bargaining agreement may authorize a person who is affiliated with a union or a community organization to act as their representative under the Occupational Safety and Health Act (OSH Act). This would include "representing the employee(s) as a personal representative" and "accompanying the employee on an OSHA inspection" in a non-unionized workplace. You also inquire whether, under these circumstances, the individual who is filing an OSHA complaint on behalf of an employee could act as a "walkaround representative" during an OSHA inspection.

For clarity, we have paraphrased your inquiry as two questions.

Question # 1 – May one or more workers designate a person who is affiliated with a union without a collective bargaining agreement at their workplace or with a community organization to act as their "personal representative" for OSH Act purposes?

Yes. The OSH Act, the Secretary's regulations implementing it, and OSHA's Field Operations Manual (FOM) all recognize the role of an "employee representative," who may represent employees' interests in enforcement-related matters. For example, a representative may: (1) file complaints on behalf of an employee (29 U.S.C. § 657(f), 29 C.F.R. § 1903.11(a)); (2) request workplace inspections (29 U.S.C. § 657(f), 29 C.F.R. § 1952.10(a)); and (3) participate in informal conferences to discuss issues raised by citations (29 C.F.R. § 1903.20). An employee representative may also contest the abatement period in OSHA citations and participate in contest proceedings filed by an employer (29 U.S.C. § 659(c)). The Field Operations Manual explains that an employee representative may include any person acting in a bona fide representative capacity, including nonprofit groups or organizations (FOM Chapter 9, I.A).

Question # 2 – May workers at a worksite without a collective bargaining agreement designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative?

Yes. The OSH Act authorizes participation in the walkaround portion of an OSHA inspection by “a representative authorized by [the employer’s] employees.” 29 U.S.C. § 657(e). Therefore, 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 so long as the individual has been authorized by the employees to serve as their representative. This right, however, is qualified by the Secretary’s regulations, which allow OSHA compliance officers (CSHOs) to exercise discretion over who participates in workplace inspections.

Section 8(e) of the OSH Act provides that, “[s]ubject to the Secretary’s regulations, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the purpose of aiding such inspection.” 29 U.S.C. § 657(e). This language makes plain that, subject to the Secretary’s regulations, where employees have chosen a representative, they have a right to have that representative accompany the CSHO during a workplace inspection. The Secretary’s regulations, 29 C.F.R. § 1903.8, qualify the walkaround right somewhat, but only in order to allow OSHA to manage its inspections effectively. They allow the Secretary or her authorized representative (the compliance officer) conducting the inspection to determine who can participate in an inspection. *See* 29 C.F.R. §§ 1903.8(a)-(d).

The legislative history of section 8 of the OSH Act shows Congress’ intent to involve employees in workplace inspections. The October 6, 1970 Senate Report declared that an authorized representative of employees would “aid the inspection” and “provide an appropriate degree of involvement of employees. . .” *See* S. REP. NO. 91-1282, 91ST CONG., 2D SESS. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5187. One of the bill’s sponsors, Senator Harrison A. Williams of New Jersey, stated that “[t]he opportunity to have the working man himself and a representative of other working men accompanying inspectors is manifestly wise and fair . . .” SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 430 (Comm. Print 1971).

The OSHA regulation implementing section 8, 29 C.F.R. § 1903.8, likewise recognizes the value of participation by employee representatives in OSHA inspections. Although the regulation acknowledges that most employee representatives will be employees of the employer being inspected, it also makes clear that there may be times when the presence of an employee representative who is not employed by that employer will allow a more effective inspection. Thus, section 1903.8(c) explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such a representative is “reasonably necessary to the conduct of an effective and thorough physical inspection.” It is OSHA’s view that representatives are “reasonably necessary” when they will make a positive contribution to a thorough and effective inspection.

And, as you point out, there are numerous ways that an employee representative who is neither an employee of the employer being inspected nor a collective bargaining agent could make an important contribution to a thorough and effective inspection. This could be because of the representative's experience and skill, for example because of experience evaluating similar working conditions in a different plant. There are also many instances where non-English speaking workers want a representative who is fluent in both their own language and English, something that will facilitate more useful interactions with the CSHO during the inspection. Finally, workers in some situations may feel uncomfortable talking to an OSHA CSHO without the trusted presence of a representative of their choosing.

OSHA recognizes that there has been some confusion about these issues arising from a March 7, 2003, OSHA letter to Milan Racic. Although this letter addressed an issue related to your inquiry, it is important to explain the distinction between the situation discussed in that letter and your letter. The Racic letter merely states that a non-employee who files a complaint does not necessarily have a right to participate in an inspection arising out of that complaint. It does not address the right of workers at a facility without a collective bargaining agreement to have a representative of their own choosing participate in an inspection. To the extent it has been interpreted to prohibit such a right, it is inconsistent with the OSH Act and with OSHA's regulations. Because of the confusion it has engendered, OSHA is withdrawing the Racic letter.

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and regulations. Our letters of interpretation do not create new or additional requirements but rather explain these requirements and how they apply to particular circumstances. This letter constitutes OSHA's interpretation only of the requirements discussed. To assure that you are using the correct information and guidance, please consult OSHA's website at <http://www.osha.gov>. If you have further questions, please contact the Directorate of Enforcement Programs at (202) 693-2100.

Sincerely,

A handwritten signature in black ink that reads "Richard E. Fairfax". The signature is written in a cursive style with a large, stylized "X" at the end.

Richard E. Fairfax
Deputy Assistant Secretary