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COMMITTEE ON
EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES
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November 13, 2023

The Honorable Julie A. Su
Acting Secretary
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Acting Secretary Su:

On August 30, the Department of Labor's (DOL or Department) Occupational Safety and Health Administration (OSHA or agency) published a proposed rule purporting to "clarify" that representatives authorized by employees to accompany an OSHA Compliance Safety and Health Officer (CSHO) in a jobsite inspection may be an employee of the employer or a third party when reasonably necessary to aid in the inspection.¹ In reality, the entire purpose of OSHA's proposed walkaround rule is to permit third parties onto a worksite who otherwise would not be allowed by the employer. In so doing, OSHA upends longstanding inspection procedures, inappropriately inserts agency officials into labor-management disputes where they have no expertise, puts union bosses ahead of workers, and increases costs for job creators. I urge the Department to abandon this foolish proposed rule, which undermines OSHA's core mission: keeping American workers safe and healthy.

The Proposed Rule OvertURNS Longstanding Regulations

The proposed rule upends OSHA's long-standing regulations² that have been in effect since the *Occupational Safety and Health Act* was first enacted and that govern the agency's inspection process, including who is allowed to participate. Under these regulations, both an employer and employees may choose a representative to accompany a CSHO during the physical inspection of any workplace for the purpose of aiding such inspection. The regulation states that the representative authorized by employees shall be an employee of the employer. However, a third party who is not an employee of the employer may be chosen if, in the judgment of a CSHO, that individual is reasonably necessary to the conduct of an effective and thorough physical

¹ Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59,825 (proposed Aug. 30, 2023) [hereinafter Proposed Rule].

² 29 C.F.R. § 1903.8.

inspection of the workplace.³ The regulation specifically cites an industrial hygienist or a safety engineer as examples of individuals who may be appropriate third-party representatives. Clearly, OSHA's regulations recognize that an individual should have safety expertise in order to provide a positive contribution to a safety and health inspection.

This long-standing interpretation makes sense considering the agency's mission. As explained by the Coalition for Workplace Safety (CWS)⁴ in a letter to the Committee,

This longstanding interpretation is consistent with the underlying statute, common sense, and applicable regulatory history. It permits OSHA to balance access to outside expertise when necessary and employer property rights, including the right to protect proprietary and confidential information that could be exposed during facility inspections.⁵

However, the proposed rule removes the regulation's reference to an industrial hygienist or a safety engineer as an appropriate third party representative. This will allow OSHA to put other agendas ahead of keeping workers safe.

The Proposed Rule Promotes Unions

OSHA is putting politics first and promoting unionization with this proposed rule. While OSHA's long-standing regulation governing walkaround inspections has been in place for decades, OSHA under the Obama administration briefly enacted a policy similar to the proposed rule via a letter of interpretation in 2013 known as the "Fairfax Memo"⁶ before it was withdrawn by the Trump administration. When the Fairfax Memo was in place, unions weaponized the OSHA inspection process against employers during the course of organizing campaigns in an attempt to tarnish the employer's image, pressure workers, and collect information about the workplace.

For example, representatives from the Service Employees International Union (SEIU) used the OSHA inspection process to target a non-union, locally owned and operated cleaning service company, Professional Janitorial Service (PJS), which had long been subject to union organizing campaigns, according to legal filings.⁷ Despite the company having never received a safety and health violation before, SEIU officials with no safety experience showed up with CSHOs at four separate PJS facilities within five months, claiming they were acting as representatives of the employees. During litigation, PJS' counsel from the Pacific Legal Foundation explained that the Fairfax Memo impermissibly allowed this behavior and that it "essentially provides cover for what amounts to trespassing" by union representatives and "gives union organizers the power to

³ 29 C.F.R. § 1903.8(c).

⁴ CWS is comprised of associations and employers that believe in improving workplace safety through cooperation, assistance, transparency, clarity, and accountability. *See* CWS, ABOUT THE COALITION, <https://workingforsafety.com/about-cws/>.

⁵ https://workingforsafety.com/wp-content/uploads/sites/4/CWS_EW-Hearing_Worker-Walkaround_Sept-2023.pdf.

⁶ <https://www.osha.gov/laws-regs/standardinterpretations/2013-02-21>.

⁷ <https://pacificlegal.org/wp-content/uploads/2016/12/Farifax-Memo-Oppn-Brief.pdf>.

intrude on private workplaces and button-hole nonunion employees, by deputizing these officials as government inspectors.”⁸

OSHA’s new proposed rule mirrors the controversial Fairfax Memo and therefore raises concerns that similar abuses will take place.

The Proposed Rule Interferes in Labor-Management Relations

A further problem with the proposed rule is that it opens the door for OSHA to inappropriately insert itself into labor-management disputes where the agency has no expertise. The proposed rule itself contemplates that employees may select a union official as their representative at a non-union workplace.⁹ According to CWS, by allowing union organizers access to employer property, the proposed rule would bypass the *National Labor Relations Act* (NLRA) and state property laws, which normally regulate such access.¹⁰ This is especially problematic considering that OSHA has no expertise in labor relations and that its own Field Operation Manual explicitly advises against its inspectors becoming involved in a worksite dispute involving labor-management issues or interpretation of collective bargaining agreements.¹¹ If made final in its current form, the walkaround proposed rule will put the agency in the middle of labor and other disputes where it has no business being, and this will pull resources away from the agency’s mission of keeping workers safe.

The proposed rule also fails to establish procedures by which a CSHO is supposed to determine whether a third party actually has the support of a majority of workers, which undermines workers’ rights. This is especially problematic in cases where a third-party union representative is claiming to act on behalf of a non-union business’ employees. Under the NLRA, unions are required to show that a majority of employees support representation before an employer can recognize them as the employee’s representative.¹² Under OSHA’s intentionally vague proposed rule, the agency could recognize a union or another third party with its own agenda to represent employees without the workers themselves ever taking a vote on such an individual. By setting no parameters about how a CSHO is to determine whether an individual is speaking for a majority of employees, the proposed rule will undermine workers’ rights.

The Proposed Rule Increases Costs

Additionally, OSHA’s claim that the proposed walkaround rule will not increase costs or compliance burdens for employers is nonsensical.¹³ In the proposed rule itself, OSHA admits there will likely be costs to employers associated with providing personal protective equipment to third parties, conducting safety briefings, and establishing procedures to protect confidential

⁸ <https://www.courthousenews.com/businesses-say-osha-rule-favors-unions/>.

⁹ See Proposed Rule, supra note 1, at 59,830.

¹⁰ https://workingforsafety.com/wp-content/uploads/sites/4/CWS_EW-Hearing_Worker-Walkaround_Sept-2023.pdf.

¹¹ https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-163.pdf.

¹² 29 U.S.C. § 159.

¹³ See Proposed Rule, supra note 1, at 59,826.

business information from third parties.¹⁴ Further, if OSHA permits hostile third parties to act as employee representatives in jobsite inspections, employers will want to consult with outside counsel and may incur property damage, reputational damage, and other liability if such individuals seek to harm their workplace. The proposed rule's cost estimate is insulting to employers as it fails to take seriously the real-world consequences of the agency's flawed proposal.

The Proposed Rule Does Not Improve Safety

Finally, the proposed rule should be rejected because it will do nothing to improve workplace safety. While OSHA claims that the proposed rule will ensure employees are able to select their own trusted and knowledgeable representatives, leading to more effective inspections,¹⁵ OSHA offers no data in the proposed rule to prove this will be the case and ignores evidence to the contrary. Instead, the proposed rule will undermine workplace safety by politicizing the inspection process and allowing hostile third parties onto the employer's property. In response, an increasing number of employers will likely deny OSHA access to its worksite, forcing OSHA to obtain a warrant from a district court. Not only will this slow down the inspection process, but this will also unnecessarily waste resources that could have been better spent on keeping workers safe.

Conclusion

Congress created OSHA and entrusted it with the important mission of protecting the health and safety of the nation's workers. In order to uphold this vital mission, OSHA should abandon the proposed walkaround rule, which will upend the longstanding inspection process, interfere with labor-management relations, and harm employers and workers. It is long past time for the Department to stop putting its political goal of promoting unionization at all costs ahead of keeping workers safe.

Sincerely,



Virginia Foxx
Chairwoman

¹⁴ See *id.* at 59,831.

¹⁵ See *id.* at 59,829.