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OSHA Issues Final Rule Allowing Employee Third-Party Representatives to Enter Workplace – Including Labor Unions

Labor Relations Update on **April 2, 2024**

On March 29, 2024, the Department of Labor Occupational Safety and Health Administration ("OSHA") released a final rule amending the Occupational Safety and Health Act of 1970 ("OSH Act"), clarifying who can serve as an employee representative to accompany the OSHA Compliance Safety and Health Officer ("CSHO") during physical workplace inspections. The final rule broadens employees' rights to allow outside representatives – including labor union representatives – to join them during safety inspections. The final rule is set to take effect May 31, 2024.

Background

The OSH Act requires that both employer and employee representatives have the opportunity to accompany the CSHO during the physical inspection of a workplace – referred to as a "walkaround rule."

Under the current rule, the OSH Act provided that the employee representative be limited to "employee(s) of the employer," but there was also an exception for a "third party who is not an employee of the employer" authorized by judgment of the CSHO to be "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." The OSH Act listed a safety engineer and an industrial hygienist as two non-exhaustive examples of authorized third-party employee representatives.

While OSHA interpreted the above-language to permit third-parties, including labor union representatives, to join employees during the inspections, a federal district court in 2017 issued a holding interpreting the language in a narrow fashion. A Texas federal judge found that only employees of the employer can participate in these inspections.

OSHA Final Rule

The final rule amends the OSH Act to state that, "[t]he representative(s) authorized by employees may be an employee of the employer or a third party."

The new language clarifies that employees are permitted to bring in outside representatives to accompany OSHA inspectors during the physical inspection of the workplace. The final rule does not change the CSHO's authority to determine whether good cause has been shown why a third-party representative is "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." However, it does expand authorized third parties to include anyone with "relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills" – rather than only those with skills comparable to a safety engineer or industrial hygienist. OSHA concluded that "these clarifications aid OSHA's workplace inspections by better enabling employees to select representative(s) of their choice," thus "…ensuring OSHA obtains the necessary information about worksite conditions and hazards."

Takeaways

It bears watching whether the final rule will be challenged in federal court, as many other recent agency rule pronouncements – particularly by the National Labor Relations Board (here) – have been challenged. If the rule survives challenge (or if it is not challenged at all), then employers should be aware of the upcoming change in the law in less than 60 days, which will broaden employees' rights during safety inspection reviews, and which may provide union access rights to the workplace that may not have previously been available under labor law or applicable collective bargaining agreements.

We will continue following this issue closely.

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