



July 12, 2013

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OSHA Opines That A Union Representative May Accompany OSHA During Worksite Inspections Of Non-Unionized Workplaces

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The Occupational Health and Safety Administration (OSHA) recently issued a letter of interpretation expanding its right to permit third parties to accompany OSHA during inspections.



The Facts

Steve Sallman is a Health and Safety Specialist with a union, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

Mr. Sallman requested that OSHA issue a letter of interpretation on whether a person who is affiliated with a union or a community organization may accompany OSHA during an inspection of a worksite in the absence of a recognized union or collective bargaining agreement.

The Occupational Health and Safety Act (OSH Act) regulations explicitly permit an authorized representative of the employees to accompany an OSHA inspector during a walk-around of a facility provided that the representative is an employee.

The regulations also provide that a third party may accompany OSHA if good cause is shown that the third party is "reasonably necessary to the conduct of an

effective and thorough physical inspection." Prior to this OSHA letter, OSHA's practice was that the non-employee had to be an independent third party technical expert, such as an industrial hygienist of safety engineer with a special expertise in, for example, ergonomic issues or process safety management (PSM).

What OSHA Said

Mr. Richard Fairfax, Deputy Assistant Secretary at OSHA, sent a letter of interpretation back to Mr. Sallman stating that the OSH Act and corresponding regulations enable a non-employee to accompany OSHA during an inspection of a non-unionized worksite under two circumstances.

Mr. Fairfax first noted a non-employee may be designated by employees of a workplace as their personal representative for OSH Act purposes regardless of whether or not the workplace has a recognized union. That third party may be a union or community organization representative and may accompany OSHA during inspections of the workplace.

Mr. Fairfax then restated that regulations allow OSHA to permit a non-employee to accompany an OSHA inspector if that third party representative is "reasonably necessary to the conduct of an effective and thorough physical inspection."

OSHA interprets this to mean that anyone capable of making a positive contribution to a thorough

inspection may be deemed "reasonably necessary" to the inspection.

What Employers Should Do

The letter of interpretation represents a substantial change in OSHA's enforcement policy. First, it substantially expands the concept of a third party that is reasonably necessary to include any person that can make a positive contribution. Second, it recognizes a union representative as a possible representative of employees in the absence of a union representation process such as recognition or a duly held election.

Even in light of this interpretation letter, employers still enjoy property rights that exclude outsiders who are not specifically authorized by the OSH Act.

Thus, if an employer is faced with an OSHA request to enter the premises to conduct an inspection, and brings a third party union representative, then the employer has the right to exclude that third party or to set conditions upon his or her entry.

Among those conditions, employers may require an entrant to sign a trade secret and confidentiality agreement, wear protective equipment, follow safety rules, and refrain from conversation with any on-duty employees or others in working areas.

Please contact us with questions. ♦