



OSHA 30/30®

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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**OSHA Just Published Proposed Rule To Permit
Inspectors to Bring More Non-Employees to
Worksites**

September 20, 2023

Manesh Rath

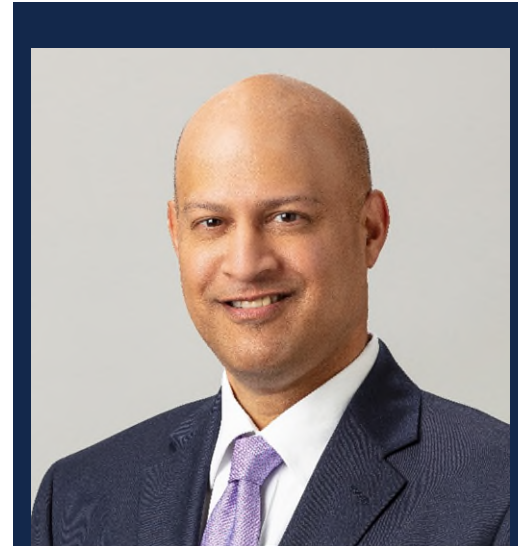


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by readers to Smart CEO Magazine's Readers' Choice List of Legal Elite; by fellow members to The Best Lawyers in America 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



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Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



Topics to be Discussed

- ◆ Legal Background: Accompaniment During Inspections
- ◆ Brief Overview of 2013 Fairfax Memo
- ◆ NFIB Lawsuit and Court Holding
- ◆ Analysis of Proposed Rule
- ◆ What Employers Should Do

Legal Background: Accompaniment On Inspections

- ◆ Section 8(e) of the OSH Act grants a representative authorized by employees the opportunity to accompany OSHA during the physical inspection of the workplace for the **purpose of aiding the inspection.**
- ◆ Currently 29 CFR 1903.08(c) states:
 - ◇ The representative authorized by employees **shall be** an employee of the employer.
 - ◇ If the CSHO, can show a third party (such as an industrial hygienist or a safety engineer) **is reasonably necessary to 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.

2013 Fairfax Memo

In 2013, The Deputy assistant Secretary, Richard Fairfax wrote a LOI that permitted *non-employees* to accompany OSHA during the walk around portion of an inspection

The LOI included union officials and labor organizations that did *not* represent the employer's employees and community organizers

This LOI broadly expanded OSHA's policy to include non-employees. OSHA Maintained that this could include union agents at a non-union site.

Legal Challenges: National Federation of Independent Businesses

- ◆ NFIB sued OSHA, alleging that the Fairfax Memo exceeded OSHA's rule making authority
- ◆ The Court held that the letter "plainly contradicts § 1903.8(c)'s requirement that the employee representative be an employee himself" or be reasonably necessary which the court implied a union representative is not
- ◆ Ultimately, the Court found that OSHA's Fairfax Memo interpretation was "a persuasive and valid construction of the OSH Act", but it needed to go through the rulemaking process



Legal Challenges: Outcome

OSHA rescinded the Fairfax Memo on April 25, 2017

Agency then revised the OSHA Field Operation Manual

Issued NPRM earlier this year

On August 30, 2023, OSHA published a proposed rule and requested comments in the federal register

Proposed Rule States:

- ◆ The representative must be authorized by employees
- ◆ May be an employee of the employer or a third party
- ◆ If the representative is not an employee, they may accompany the CSHO during the inspection if:
 - ◆ good cause has been shown that they are reasonably necessary to the conduct of an effective and thorough inspection
 - ◆ they have relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language skills

OSHA's Examples of Non-Employee Representatives



Local union leader, business agent, or safety and health specialist

Representative from worker advocacy group, community organization, or labor union

Safety organizations, like local safety councils, or technical representatives for the equipment used at the worksite

Multi-employer worksites

Where employees may not be fluent in English

Employees may be uncomfortable speaking candidly with government officials

Reactions to the Proposed Rule



The CSHO must still show that the third-party is truly a representative

Employers are concerned that this allows unionization outside of the certified bargaining process

Violates NLR Act if OSHA picks the employee representative

Fairfax himself recently said he's concerned that the proposed rule could put unnecessary pressure on OSHA Inspectors

Considers an employee representative "reasonably necessary" to conduct an inspection

These reasons for the new rule only help to facilitate the inspection, but they are not reasonably necessary

Limitations

- ◆ OSHA claims that the proposed revisions do not affect other provisions of section 1903 that limit participation in walkaround inspections
- ◆ CSHOs still have authority to prevent an individual from participating in the walkaround inspection if their conduct interferes with a fair and orderly inspection
- ◆ Employers still have a right to limit entry of employee authorized representatives into areas of the workplace that contain trade secrets

What Employers Should Do:



The deadline for comments is October 30, 2023.

Inform business leadership of the lawful unionization process

Prepare management for OSHA inspections

Properly Designate areas that are protected by trade secrets

Consistently maintain safety orientation requirements for all visitors

State plan states have 6 months to create a rule that is "at least as effective"



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